Volume 6, No. 24, Pages 6825 to 7098,
November 18 - November 29, 1991

FCC Record

A comprehensive compilation of decisions, reports, public notices and other documents of the Federal Communications Commission of the United States.

FEDERAL COMMUNICATIONS COMMISSION

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Citation Form: 6 FCC Rcd 1 (1991)

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Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

Acceptance of 929-930 MHz
One-way Paging Applications

ORDER

Adopted: November 8, 1991; Released: November 12, 1991

By the Chief, Private Radio Bureau:

1. On October 4, 1991, the Private Radio Bureau (Bureau) released an *Order* that froze acceptance of all new applications for one-way paging systems in the 929-930 MHz band (DA 91-1257). In the *Order*, the Bureau noted that its licensing records indicated that on a nation-wide basis there were relatively few licensees operating on the 900 MHz one-way paging frequencies. The Bureau further stated that it was currently studying alternatives for managing the 900 MHz paging spectrum that would encourage greater use of these channels and enhance service quality. To retain the flexibility to pursue a variety of regulatory options, the Bureau believed that the public interest would be best served by freezing all further licensing on these channels.

2. Since that *Order* was adopted, the Bureau has become aware of significant recent activity in the private carrier paging industry. A number of private carrier paging entities have made significant capital expenditures that would, in effect, be inadvertently stranded during the pendency of the licensing freeze and result in severe economic harm to those entities. The freeze on applications could also result in a temporary denial of service in many areas where there is a need for private paging services. In fact, our object was to encourage use of the band, not restrict it.

3. Therefore, for reasons of equity to those who may suffer severe economic harm if the freeze were to remain in effect in whole or in part, we will lift the freeze and begin again to accept applications for 900 MHz one-way paging systems effective immediately with the release of this Order. The Bureau will continue to study alternatives for managing the 900 MHz private paging spectrum. New applicants for these frequencies and existing licensees should be aware that a comprehensive rule making in this area could result in significant changes in the way that 900 MHz private paging systems are licensed and operated. These changes could affect existing stations, as well as stations licensed subsequent to the adoption of new rules.

4. It is therefore ORDERED that, pursuant to the provisions of Section 4(j) of the Communications Act of 1934, as amended, 47 U.S.C. § 154(j), and Sections 0.131 and 0.331 of the Commission's Rules, 47 C.F.R. §§ 0.131 and 0.331, we will resume acceptance of applications for the 900 MHz one-way paging channels as of the date of this Order.

5. For further information, contact the Consumer Assistance Branch, Licensing Division, Private Radio Bureau, (717) 337-1212.

FEDERAL COMMUNICATIONS COMMISSION

Ralph A. Haller
Chief, Private Radio Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 88-524

In re Applications of

WILLIE A. JEFFERSON d/b/a OPPORTUNITY BROADCASTING OF SHREVEPORT	File No. BPH-870814MK
NTW, INC.	File No. BPH-870820ME
PORT CITY COMMUNICATIONS, L.P.	File No. BPH-870820MH
CADDO BROADCASTING LIMITED PARTNERSHIP	File No. BPH-870820MR

For Construction Permit for a New FM Station on Channel 275C2 in Shreveport, Louisiana

Appearances

Jeffrey D. Southmayd, and *Stephen C. Simpson*, on behalf of Opportunity Broadcasting of Shreveport; *Gene A. Bechtel*, on behalf of NTW, Inc.; *David Honig*, on behalf of Port City Communications L.P.; *Michael J. Hirrel and Miriam C. Kircher*, *James J. Freeman*, *Gregory W. Whiteaker*, *Mary V. Huff*, and *Joel E. Laiks*, on behalf of Caddo Broadcasting Limited Partnership; and *Larry Miller*, on behalf of the Chief, Mass Media Bureau.

SUPPLEMENTAL INITIAL DECISION OF ADMINISTRATIVE LAW JUDGE EDWARD LUTON

Issued: November 7, 1991; Released: November 19, 1991

I. PRELIMINARY STATEMENT

1. The *Initial Decision* in this case granted the application of Innovative Women's Media Association. *Willie A. Jefferson*, FCC 90D-16, released April 20, 1990. Thereafter, the Review Board remanded the proceeding for further hearings and the preparation of a supplemental initial decision on certain issues relating to Innovative's application. *Willie A. Jefferson*, FCC 91R-22, released March 12, 1991. By *Order*, FCC 91M-1859, released June 11, 1991, the presiding officer dismissed Innovative's application for failure to prosecute, thereby mooting the remanded issues.

2. During the pendency of the case on remand, the presiding officer granted the motion of NTW, Inc. to Enlarge Issues With Respect to Port City Communications, L.P., filed on April 26, 1991. *Order*, FCC 91M-1867, released June 12, 1991. Those added financial and financial certification issues were resolved in favor of Port City upon a grant of its motion for summary Decision. *Order*, FCC 91M-3120, released October 21, 1991.

II. FINDINGS OF FACT

3. As set out in the Initial Decision, each of the remaining applicants is entitled to 100% quantitative integration credit. Overall, the applicants are ranked in the following order: 1) NTW, Inc.; 2) Caddo Broadcasting Limited Partnership; 3) Port City Communications, L.P.; and 4) Opportunity Broadcasting of Shreveport.

III. CONCLUSIONS OF LAW

4. NTW's enhancements for the long-term local residence and extensive local civic participation of its principals, combined with their superior (as compared to Caddo) record of broadcast experience, outweigh Caddo's preferences for minority and female participation. NTW is the preferred applicant herein, and its application will be granted.

Accordingly, IT IS ORDERED that unless an appeal from this Supplemental Initial Decision is taken by a party, or it is reviewed by the Commission on its own motion, the application of NTW, Inc. (File No. BPH-870820ME) IS GRANTED, and the applications of Caddo Broadcasting Limited Partnership (File No. BPH-870820MR), Port City Communications, L.P. (File No. BPH-870820MH), and Opportunity Broadcasting of Shreveport (File No. BPH-870814MK) ARE DENIED.[1]

FEDERAL COMMUNICATIONS COMMISSION

Edward Luton
Administrative Law Judge

FOOTNOTE

[1] In the event exceptions are not filed within thirty (30) days after the release of this Initial Decision, and the Commission does not review the case on its own motion, this Initial Decision shall become effective fifty (50) days after its release pursuant to Section 1.276 (d) of the Commission's Rules.

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

Amendment of the Commission's Rules to Authorize Cellular Carriers to Offer Auxiliary and Non-Common Carrier Services — RM - 7823

ORDER

Adopted: November 8, 1991; Released: November 12, 1991

By the Deputy Chief, Common Carrier Bureau:

1. On November 5, 1991, the Land Mobile Section of the Telecommunications Industry Association (TIA) requested an extension of time to file comments in the above-referenced proceeding. The Land Mobile Section requests a thirty day extension of the normal comment period, from November 12, 1991 to December 12, 1991.

2. The request explains that TIA represents numerous telecommunications equipment manufacturers and suppliers who will be affected by the proposals in the petition for Rule Making and needs additional time to gather information from them. Therefore, the request shows good cause why the Land Mobile Section of TIA needs additional time to submit its comments in this proceeding.

3. We find that the public interest will be served by granting an extension which will allow the filing of more meaningful comments. However, we do not believe that the request demonstrates the need for a thirty day extension. Accordingly, we will grant a fourteen day extension, until November 26, 1991, for all parties to file comments in this proceeding. The time for filing reply comments is extended to December 11, 1991.

4. Accordingly, the Land Mobile Section's request for an extension of time IS GRANTED to the extent indicated herein and otherwise IS DENIED. The deadline for filing comments in the captioned proceeding is extended to November 26, 1991. The deadline for filing reply comments is extended to December 11, 1991.

FEDERAL COMMUNICATIONS COMMISSION

Gerald P. Vaughan
Deputy Chief, Common Carrier Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 91-122

In the Matter of

Commission Policies
Regarding Spousal Attribution

ERRATUM

Released: November 13, 1991

On May 8, 1991, the Commission released a *Notice of Inquiry*, 6 FCC Rcd 2492 (1991), in the above-captioned proceeding. Paragraph 7, line 6 should be corrected by deleting the following phrase: "owned by The Times Mirror Company."

For further information, contact Jackie E. Chorney, Mass Media Bureau, at (202) 632-7792.

FEDERAL COMMUNICATIONS COMMISSION

Roy J. Stewart
Chief, Mass Media Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 86-324

In the Matter of

Amendment of Section 73.202(b),	RM-5395
Table of Allotments,	RM-5589
FM Broadcast Stations	
(Burnet and Mason, Texas)	

MEMORANDUM OPINION AND ORDER
(Proceeding Terminated)

Adopted: November 7, 1991; Released: November 19, 1991

By the Chief, Policy and Rules Division:

1. The Commission has before it a petition for reconsideration filed by Encore Communications Associates, L.P. ("Encore"), former licensee of Station KHFI-FM (now KVET-FM), Channel 251C1, Austin, Texas, requesting that the Commission reconsider its *Report and Order* (*"R&O"*) in this proceeding, 3 FCC Rcd 73 (1988). In that *R&O*, we allotted Channel 250C2 at Mason, Texas, at a restricted site 10.6 kilometers northwest of the community. For the reasons stated below, we will dismiss the petition for reconsideration as moot.

2. In the petition for reconsideration, Encore requested that the Commission adjust the site restriction for the allotment of Channel 250C2 at Mason to permit full separation with the site specified in Encore's Station KHFI-FM construction permit application for Channel 251C1, as modified (File No. BPH-870302MH, as modified by File Nos. BMPH-880219IC, BMPH-890103JR, BMPH-890124IE, and as replaced by File No. BPH-891128JZ). Encore stated that the reference coordinates of the site for Mason, Texas, would be 0.59 kilometers short-spaced to the site specified in its application for modification of construction permit. Encore stated that despite its diligent efforts to find a site which meets all of the Commission's separation requirements, it was unable to locate such a site due to local zoning, environmental and other considerations.

3. Since the filing of the petition for reconsideration, the Commission granted Encore's applications for modification of construction permit (File No. BMPH-880219IC granted on July 7, 1988), and license to cover construction permit (File No. BLH-900420KB granted on February 27, 1991) for Station KHFI-FM (now KVET-FM), Channel 251C1, Austin, Texas. Commission records show that Station KVET-FM, Channel 251C1, Austin, Texas, is licensed at coordinates North Latitude 30-13-24 and West Longitude 97-49-39. We also note that on August 31, 1989, the Commission granted an application (File No. BPH-881027ML) for construction permit for Station KOAX(FM), Channel 250C2 at Mason, Texas, at coordinates North Latitude 30-37-25 and West Longitude 99-25-41. According to a Commission engineering analysis, the Station KVET-FM licensed site is fully spaced pursuant to our minimum distance separation requirements with respect to the site specified in the Station KOAX(FM) construction permit. Therefore, the petition for reconsideration filed by Encore will be dismissed because the issue raised in that petition is now moot. [1]

4. Accordingly, IT IS ORDERED that the petition for reconsideration filed by Encore Communications Associates, L.P., IS DISMISSED.

5. IT IS FURTHER ORDERED, that this proceeding IS TERMINATED.

6. For further information concerning this proceeding, contact Victoria M. McCauley, Mass Media Bureau, (202) 634-6530.

FEDERAL COMMUNICATIONS COMMISSION

Douglas W. Webbink
Chief, Policy and Rules Division
Mass Media Bureau

[1] We further note that on October 9, 1991, Spur Austin, L.P., licensee of Station KVET-FM, Austin, Texas, Encore's successor in interest pursuant to assignment of license and construction permit granted July 24, 1990 (File No. BAPLH-900501GP), filed a motion to withdraw the subject petition for reconsideration "so long as the allocation for Mason, Texas, is not short-spaced to its site and meets all of the Commission's separation requirements." We need not address this condition because KVET-FM's licensed site is fully protected with respect to the Commission's spacing requirements.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 89-350

In re Applications of

EMISION DE RADIO BALMESEDA, INC.	File No. BPH-870505MA
SAFE CARE, INC.	File No. BPH-870505MB
TALLAHASSEE BROADCASTING CO.	File No. BPH-870506MG
CHAMELEON BROADCASTING, INC.	File No. BPH-870506MH
DALE BROADCASTING, INC.	File No. BPH-870506MK
FIRST COAST RADIO, INC.	File No. BPH-870506MN
LEEANN KENDALL SCOPINICH	File No. BPH-870506MQ

For Construction Permit for
New FM Station, Channel 293A,
Ponte Vedra Beach, Florida

ORDER

Adopted: November 7, 1991; Released: November 18, 1991

By the Review Board: BLUMENTHAL, ESBENSEN, and GREENE.

1. The *Initial Decision* of Administrative Law Judge John M. Frysiak, 6 FCC Rcd 5239 (1991), denied the application of Tallahassee Broadcasting Co. That applicant has not timely filed exceptions with the Board.

2. ACCORDINGLY, IT IS ORDERED, That pursuant to 47 CFR § 1.276(f), the application of Tallahassee Broadcasting Co. (File No. BPH-870506MG) IS DISMISSED with prejudice.

FEDERAL COMMUNICATIONS COMMISSION

Norman B. Blumenthal
Member, Review Board

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 91-86

In re Applications of

WILLIAM F. PEEL, JR.	File No. BPH-890906MM
MINORITY BROADCASTING GROUP LIMITED	File No. BPH-890914MT
KAREN M. LOWERY	File No. BPH-890914MU
SEA OAKS BROADCASTING	File No. BPH-890914ND
CRYSTAL COMMUNICATIONS, INC.	File No. BPH-890914NF
WHITE CITY BROADCASTING, INC.	File No. BPH-890914NP
Q PRIME INC.	File No. BPH-890914NV
HEATHER WILLSON CASS	File No. BPH-890914NW
MIDWAY BROADCASTING COMPANY	File No. BPH-890914OD

For Construction Permit for
New FM Station, Channel 284A,
White City, Florida

MEMORANDUM OPINION AND ORDER

Adopted: November 7, 1991; Released: November 18, 1991

By the Review Board: Board Member BLUMENTHAL Concurring In Result and issuing a statement in which Board Member ESBENSEN joins.

1. At an evidentiary admissions session held August 28, 1991 (Tr. 163-171), the presiding Administrative Law Judge rejected the written direct case of Karen M. Lowery (Lowery) because its presentation "at this time, unduly burdens the administrative processes, and prejudices" the other applicants. To require the acceptance of her direct case exhibits, on September 4, 1991, Lowery filed with the Review Board a "Petition for Extraordinary Relief and Request for Waiver of Section 1.115(e) of the Commission's Rules". Leave to appeal was denied by the presiding officer on September 5, 1991. FCC 91M-2734. Two of the competing applicants, William F. Peel, Jr. and Sea Oaks Broadcasting, without discussing the Board's jurisdiction to review the evidentiary ruling, have opposed Lowery's petition on the merits. We will deny the relief requested by Lowery because she has failed to justify her unauthorized 47 CFR § 1.301(b) appeal.

2. Lowery recognizes that she seeks review of "an interlocutory ruling not appealable under the Commission's rules." Petition, p. 1. She submits that: "Appeal is warranted, however, where it is shown that the circumstances are urgent. *George E. Cameron, Jr., Communications*, 51 RR 2d 1419 (1982)." *Id.* Lowery's request for waiver of Section 1.115(e), and her reliance on the *Cameron* case, *supra*, are misplaced because those authorities involve applications for review to the Commission, and review was denied. Our jurisdiction to review the present evidentiary ruling is governed by 47 CFR § 1.301(b), and the Commission's earlier decision in *George E. Cameron, Jr., Communications*, 48 RR 2d 1161, 1162 (1980). There, an ALJ had also rejected all comparative exhibits, and the Commission held that the ruling was not appealable unless authorized by the ALJ because such authorization "is a prerequisite for this appeal under Section 1.301(b) of the Rules." *Id. See also Doylan Forney*, FCC 86R-20, released April 4, 1986; and *Magdalene Gunden Partnership*, FCC 86R-38, released June 10, 1986.

3. A review of the history of Section 1.301 establishes that, in 1970, the Commission, following the Federal practice, strictly limited appeals from interlocutory rulings to those specifically listed in Section 1.301(a). In Section 1.301(b), the Commission provided that "no other interlocutory ruling may be appealed without the consent of the presiding officer and that appeal, [even] if allowed, may be dismissed by the Review Board or the Commission." *See Practice and Procedure*, 20 RR 2d 1613, 1615 (1970). These new rules, the Commission explained, "will expedite the conduct of hearing proceedings, by strengthening the position of the presiding officer, by cutting down on hearing delays occasioned by appeals which should be deferred pending action on the merits, and by freeing the Review Board to spend its resources on the other matters coming before it." *Id.*[1] Recently, after reviewing the relevant precedent, we held that the Board cannot consider unauthorized Section 1.301(b) appeals "unless egregious error or flagrant abuse of discretion is shown". *Capitol City Broadcasting Co.*, FCC 91R-87, released October 4, 1991, and cases cited therein. Moreover, the Commission itself has held that there must be a showing that the "interlocutory ruling raises far-reaching and vital concerns to the public interest which could not otherwise be adequately protected" on review of the *Initial Decision*. *See Carmel Broadcasting Limited Partnership*, 6 FCC Rcd 3287, at para. 3 (1991), and 47 CFR § 1.301(b).

4. Here, in a Supplement to her petition filed October 4, 1991, at p. 2, Lowery reported that the ALJ had denied her "Motion for Leave to Appeal the rejection of her direct case exhibits from the evidentiary record." However, neither in the original petition, nor in two subsequent supplements, did she attempt to make the showing required by the controlling precedent discussed above. Following the Commission's decision in the comparable 1980 *Cameron* case, *supra*, 48 RR 2d at 1162-3, we will deny Lowery's unauthorized appeal. Of course, an objection to the ALJ's ruling "may be raised on review of the Initial Decision." 47 CFR 1.301(b)(1).

5. ACCORDINGLY, IT IS ORDERED, That Karen M. Lowery's Petition for Extraordinary Relief and Request for Waiver of Section 1.115(e) of the Commission's Rules, filed September 4, 1991, and supplemented on September 5, and October 4, 1991, IS DENIED without prejudice.

FEDERAL COMMUNICATIONS COMMISSION

Joseph A. Marino
Chairman, Review Board[2]

FOOTNOTES

[1] *See e.g., Mark L. Wodlinger*, 3 FCC Rcd 3139, 3143 paras. 21-22, 3145 n. 9 (Rev. Bd. 1988) (where the Board, unaware of the true facts at the time, entertained an unauthorized interlocutory appeal, (2 FCC Rcd 3196, 3197 n. 1 (Rev. Bd. 1987)), but subsequently on further review was constrained to concede that its earlier ruling was "quite possibly erroneous.")

[2] Based on inconsistent and mushy filings by Lowery, before the ALJ and on appeal, the Board Chairman, speaking for himself, is not so certain that "appellant may well prevail on the merits of its" or her arguments. Since 1970, the Commission has been "strengthening the position of the presiding officer" to expedite the hearing process. *See* para. 3, above. Section 1.301(b) is not a mere technicality: "The purpose behind the rule is to ensure orderly procedure in Commission adjudicatory proceedings and to avoid lengthy delays every time a party is dissatisfied with an ALJ's ruling on an interlocutory matter." *Carmel Broadcasting, supra*. In *Hillebrand Broadcasting, Inc.*, 1 FCC Rcd 419 (1986), the Commission instructed all hearing officials to no longer "indulge . . . temporizing activities of applicants," especially in multiparty cases like the present one. Recently, the *Report and Order* on *Proposals to Reform the Commission's Comparative Hearing Process to Expedite the Resolution of Cases*, 6 FCC Rcd 3403 (1991), mandated strict and specific deadlines, as did the ALJ's *Prehearing Order*, FCC 91M-1639, released May 16, 1991, para. 10, which may have been breached by Lowery's metamorphosis during the critical prehearing stage. "Lowery has been an individual applicant, a corporation, and a limited partnership. At the present time, it is not clear just exactly how Lowery is prosecuting her application." Opposition of William F. Peel, Jr. filed September 13, 1991, p. 2.

STATEMENT OF
BOARD MEMBER NORMAN B. BLUMENTHAL
Concurring in Result In which BOARD MEMBER ERIC T. ESBENSEN Joins

Because, technically speaking, we here treat with an unauthorized appeal from an interlocutory "evidentiary" ruling that does not terminate appellant's right to participate in the hearing or to file exceptions to the ruling under appeal, I concur with our *Order* as it is based wholly on a procedural foundation. It seems a very close case, however, as to whether the Board should forestay its intervention, since appellant may well prevail on the merits of its argument that the core ruling was incorrect, thus necessitating a remand so that appellant's comparative case might be properly considered.

From appellant's pleadings, which are not as clear as would have been preferable, it appears that appellant is the successor to four merged (original) applicants, three of whom dismissed and fell in behind Karen M. Lowery. Pursuant to settlement, all were to have folded into a new corporation in which Lowery would have been the sole voting shareholder, while the three dismissing applicants would become non-voting shareholders. This settlement was approved on June 18, 1991. Shortly thereafter, appellant sought to amend (allegedly for tax reasons) from a two-tier corporation to a limited partnership form, though the ownership proportions and the active/passive elements were apparently unchanged from the corporate counterpart. The ALJ rejected this amendment, and, subsequently, the direct hearing exhibits of appellant, because the exhibits were predicated on a limited partnership.

It seems clear from the ALJ's rulings or from appellant's pleadings that the ALJ would have admitted the exhibits, had appellant maintained its corporate form. If so, his (unstated) reasons for rejecting the limited partnership are indeed puzzling. *Quo animo*.

Though we do not intercede at this point, it would be helpful -- should appellant choose to remain in the hearing and except to the ruling(s) at issue -- if appellant took greater care with its pleadings to illuminate fully both the facts and the law, so that the Board not be put to the unilateral labor of researching and constructing *sua sponte* appellant's case, [1] lest appellant prove only the case of Vice President Quayle.

FOOTNOTE TO STATEMENT

[1] In that regard, and though mergers are certainly *not discouraged, see Settlement Agreements*, 6 FCC Rcd 2091-92 (1991), it would be exceedingly useful if appellant explained its postdesignation posture under the anti-upgrading tenets of *Daytona Broadcasting Co., Inc.*, 101 FCC 2d 1010 (1985), *modified on recon.*, 103 FCC 2d 931 (1986), and also the Commission's recent holdings in *Evergreen Broadcasting Co.*, FCC 91-267, released September 20, 1991, at paras. 8-9 & n. 11, as they control the *post*-cut-off recognition of limited partnership provisions.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 90-96

In re Applications of

SUNBELT, LIMITED PARTNERSHIP	File No. BPH-880308ME
TROY BROADCASTING CORP.	File No. BPH-880310MJ
RALPH W. BLACK, JR.	File No. BPH-880310MT

For Construction Permit for
New FM Station, Channel 234A,
Brundidge, Alabama

MEMORANDUM OPINION AND ORDER

Adopted: November 12, 1991; Released: November 20, 1991

By the Review Board: MARINO (Chairman), BLUMENTHAL, and ESBENSEN.

1. Before the Review Board are Exceptions to the *Initial Decision*, FCC 91D-53, released October 8, 1991, of Sunbelt, Limited Partnership and Ralph W. Black, Jr., both filed November 7, 1991.

2. Sunbelt's Exceptions are 43 pages in length (not including the table of contents and table of authorities); Black's Exceptions are 53 pages in length. Thus, both sets of Exceptions substantially exceed the 25-page limitation specified in 47 CFR § 1.277(c) (*revised*). *See Proposals to Reform the Commission's Comparative Hearing Process to Expedite the Resolution of Cases*, 6 FCC Rcd 157, 163 (1990) (*Reform Order*), *modified*, 6 FCC Rcd 3403, 3404 (1991).[1]

3. Perhaps realizing its error, on the day subsequent to filing its Exceptions (November 8, 1991), Black requested a waiver of the page limitation requirement specified in 47 CFR § 1.277(c). The Commission's *Reform Order* noted that the Board may grant such waivers "particularly in complex cases" (6 FCC Rcd at 3404); however, in this three-party proceeding, no persuasive grounds for waiver have been demonstrated.

4. ACCORDINGLY, IT IS ORDERED, That the "Request for Waiver of Page Limitation" filed by Ralph W. Black, Jr., on November 8, 1991, IS DENIED; and,

5. IT IS FURTHER ORDERED, That the Exceptions of Sunbelt, Limited Partnership and Ralph W. Black, Jr., both filed November 7, 1991, ARE DISMISSED subject to being refiled in the proper form within ten (10) days of the release date of this *Order*.[2]

FEDERAL COMMUNICATIONS COMMISSION

Eric T. Esbensen
Member, Review Board

FOOTNOTES

[1] Troy Broadcasting has filed a "Statement in Support of . . . Initial Decision" which fully comports with the page limitations of 47 CFR § 1.277(c).

[2] *Cf. Doylan Forney*, FCC 88I-123, released December 13, 1988. Because of the time constraints involved and the approaching date for filing Reply Exceptions, pre-publication copies of this document are being made available to the parties.

Before the
Federal Communications Commission
Washington, D.C. 20554

In re Application of:

CONTINENTAL CELLULAR — File No. 10003-CL-P-316-A-88

For facilities in the Domestic Public Cellular Telecommunications Radio Service on Frequency Block A, in Market 316, Alaska 2 (Bethel).

and

In re:

Nineteen Rural Service Area Applications Filed by Partnerships with Alien Partners	File Nos. 10109-CL-P-675-A-88 10311-CL-P-403-A-88 10621-CL-P-366-A-89 10513-CL-P-460-A-89 10226-CL-P-423-A-88 10625-CL-P-370-A-89 10511-CL-P-458-A-89 10104-CL-P-545-A-88 10613-CL-P-313-A-89 10504-CL-P-440-A-89 10038-CL-P-319-A-88 10049-CL-P-699-A-88 10449-CL-P-509-A-89 10265-CL-P-488-A-88 10407-CL-P-659-A-88 10420-CL-P-672-A-89 10083-CL-P-611-A-88 10174-CL-P-634-A-88 10230-CL-P-427-A-88

MEMORANDUM OPINION AND ORDER

Adopted: November 8, 1991; Released: November 20, 1991

By the Commission:

I. INTRODUCTION

1. The Commission has before it a proceeding involving alien ownership of a Commission cellular applicant remanded from the U.S. Court of Appeals for the District of Columbia Circuit at the Commission's request, for further consideration and refinement of the record.[1] Continental Cellular (Continental)[2] filed its application as a general partnership. One of the general partners was a non-United States citizen. [3]

2. The Mobile Services Division (MSD) has also dismissed twenty other applications for various nonwireline RSA markets because the applicants had impermissible alien non-insulated partners under Section 310(b)(3) of the Communications Act. All of these applicants have filed petitions for reconsideration. Because of the similarity of the issues presented in nineteen of these proceedings named in the Committee for a Fair Lottery's motion, we are consolidating the pleadings of those applicants (listed in Appendix A) hereto.[4] Additionally, we deny the petitioners' requests for oral argument because the written record is sufficient to allow us to make a decision.

3. Continental argues that the MSD has erred in dismissing its application for violation of the alien ownership rules as they pertain to partnership interests held by foreign citizens. Upon further consideration of the record, we find that the MSD was correct in returning Continental's application as defective. We also find the MSD properly returned all of the applications listed in Appendix A.

II. BACKGROUND

4. Continental filed an application for a non-wireline facility to serve the Alaska 2 (Bethel) Rural Service Area (RSA) on July 15, 1988. A lottery was held and Continental was announced as the tentative selectee on September 27, 1988.[5] The MSD returned Continental's application on October 26, 1988 for failure to comply with the alien ownership restrictions of the Communications Act because Continental's partnership contained three alien general partners.[6] On November 30, 1988, Continental filed a Petition for Reconsideration, arguing that Section 310(b)(3) of the Act and Section 22.4 of the Commission's rules only prohibit a grant of a license to a foreign owned corporation and make no mention of partnerships. Continental also argued that it has insulated the alien partners from management and control of the partnership. Finally, Continental stated that its amendment changing the partnership to a limited partnership should be allowed.

5. In *Continental Cellular*, 5 FCC Rcd 691 (1990), the Commission denied reconsideration, stating that while the Act and rules may only specifically refer to corporations, the alien ownership restrictions are also applicable to non-corporate entities and associations. Relying on *Wilner & Scheiner*, 103 FCC 2d 511 (1985), *reconsidered in part*, 1 FCC Rcd 12 (1986), (*Wilner & Scheiner* and *Wilner & Scheiner Reconsideration Order*), the Commission stated that the statutory restrictions were specifically interpreted to encompass partnerships. In *Wilner & Scheiner Reconsideration Order*, the Commission reasoned that non-limited partners[7] occupy positions comparable to those held by officers and directors in a corporation and construed the officer and director restrictions to apply to these partnership interests.[8] Additionally, the Commission found that although Continental may have tried to insulate the alien partners from management and control, Section 310(b)(3) of the Act reflects a Congressional concern over alien ownership of Commission licenses even in those circumstances where the alien's ownership interest does not confer actual control. The Commission concluded that Continental's application had been properly returned and Continental was not permitted subsequently to file a corrective amendment.

6. Continental then filed an appeal with the U.S. Court of Appeals for the District of Columbia Circuit (court). On October 1, 1990, at the Commission's request, the court remanded the case for further consideration of the record.[9] On November 28, 1990, Continental filed Supplemental Comments. The 18 general partnership applicants filed applications for various RSA markets, won the

lottery in a market, and were named tentative selectee for the markets in which they won the lottery. The general partnership applicants each had from one to four alien general partners which owned from 2 to 25.984 percent of the applicant. All of these applicants filed amendments to change their alien general partners to limited partners after their applications were filed or to otherwise divest the alien of any control in the partnership. The MSD dismissed these applications for failure to comply with the alien ownership restrictions in Section 310(b)(3) of the Act. All of the general partnerships filed petitions for reconsideration of their dismissals. Sacramento filed an application as a limited partnership pursuant to California law, won a lottery and was named tentative selectee for that market. Sacramento's application was dismissed because it had a 4.545 percent alien non-insulated limited partner in violation of Section 310(b)(3) of the Act.

III. DISCUSSION

A. Inclusion of a Partnership within the Prohibitions of Section 310(b)(3)

7. The petitioners argue that the prohibitions of Section 310(b)(3) of the Act and Section 22.4 of the rules do not refer or apply to partnership interests because the language of the prohibitions specifically refers only to corporate interests. We do not agree. Section 310(b)(3) of the Act[10] addresses the participation of foreigners in the provision of broadcast, common carrier, aeronautical en route or aeronautical fixed services.[11] The proscriptions of Section 310(b)(3) are also reflected in Section 22.4 of our rules.[12] While the language of the statute and rule specifically addresses corporate applicants, the alien ownership restrictions have been applied with equal force to non-corporate entities and associations.[13] As we noted in *Wilner & Scheiner*:

> the definitional language of the Communications Act provides that the statutory proscriptions extend beyond corporate entities. The definition of "corporation" contained in the Communications Act "includes any corporation, joint-stock company or association." Since a . . . partnership is one form of "association," the statutory language itself establishes that interests in these types of businesses are properly encompassed within the scope of Section 310(b).

103 FCC 2d at 514 (footnotes omitted). The Commission also noted that use of the word "includes" in the statutory definition of "corporation" suggests there are additional entities which fall under the definition. The petitioners argue that because the definition of "person" in the Act[14] includes both associations and partnerships, the latter are not included within the definition of corporation. This argument would suggest that in an attempt to curb alien ownership of certain communications facilities, Congress prevented only foreign-controlled corporations from holding Commission licenses but not foreign-controlled partnerships. We find this argument untenable. Indeed, it is consistent with the Congressional intent to find limited partnership included within the auspices of Section 310(b)(3). *Id.* at 514-5. To reiterate, the Commission determined in *Wilner & Scheiner*, when asked to decide whether aliens may hold limited partnership interests exceeding the statutory limitation placed on shareholders of a corporate licensee, that limited partnership interests are subject to the citizenship requirements of Section 310(b)(3). Therefore, the inclusion of partnership interests within the prohibitions of Section 310(b)(3) is consistent with the Congressional objective and Commission decisions, and does not represent a new interpretation or rule.

B. Curative Amendments

8. The petitioners argue that the Act does not prohibit the filing of an application with foreign ownership. They posit that any changes prior to final grant are acceptable.[15] The Act does, however, allow the Commission to make any rules and regulations as it may deem necessary.[16] Our cellular processing rules provide that an application will be dismissed as unacceptable for filing if it "does not comply with the Commission's rules, regulations, specific requirements for additional information or other requirements." 47 C.F.R. Section 22.20(a)(2). An application that does not comply with the alien ownership provisions of the Act and our rules, 47 U.S.C. Section 310(b)(3); 47 C.F.R. Section 22.4(b)(3), is thus unacceptable for filing and properly dismissed.

9. In *Cellular Lottery Rule Making*, 98 FCC 2d 175 (1984), in the interest of administrative efficiency, the Commission framed Section 22.918(b) of the rules to "strictly limit[] the filing of amendments to applications for the below 90 markets under lottery procedures." *Id.* at 220.[17] While Section 22.918(b) does permit the filing of minor amendments by the tentative selectee, we have consistently construed Section 22.918(b) to prohibit post-filing or post-lottery amendments to cure acceptability defects. *See Progressive Cellular III B - 2*, 5 FCC Rcd 2772 (1990); *REM Communications*, 3 FCC Rcd 3705 (1988).[18] Accordingly, under our cellular processing standards, any application containing a defect, such as violation of the alien ownership restrictions, is dismissed without opportunity to cure. The fact that the alien ownership restrictions in the Act and our rules do not explicitly say a noncomplying application may not be filed does not change this analysis. The language of the alien ownership provision cannot reasonably be read to mean that a noncomplying application can be filed. This fact is particularly true given Question 12 on FCC Form 401 for a Common Carrier radio station authorization,[19] asks applicants to certify compliance with the statute's alien ownership restrictions. It cannot be reasonably argued, therefore, that an alien cellular applicant can assume it can file a non-grantable application and fix it later.[20] Therefore, to the extent the application violated the alien ownership restrictions, the MSD was correct in refusing to accept the change of ownership amendments filed by the various applicants in this proceeding.

C. Insulation of Non-Limited Partners

10. Certain petitioners argue that their alien non-limited partners had been insulated from management of the partnership and therefore were in compliance with Section 310(b)(3)'s ownership restrictions because they would be below the 20 percent alien ownership benchmarks.[21] The Commission in *Wilner & Scheiner*, however, made it clear that all non-insulated partnership interests, such as the interests at issue here, will be attributed and considered comparable to the interests held by officers and directors for alien ownership purposes. 103 FCC 2d at 520 n. 43. On reconsideration, the Commission specifi-

cally rejected the suggestion that such non-limited partners could avoid the dictates of Section 310(b)(3) by insulation. 1 FCC Rcd at 15 ("We have no power to accord a statutory 'exemption' to a person holding a positional interest otherwise subject to the scope of Section 310(b) because he or she agrees, as a matter of private contract, not to exercise the powers inherent in that position"). Only insulated limited partners may be treated as shareholders (and not as officers and directors), and then, only when certain circumstances are met.[22] The partners here were all non-limited partners and accordingly, their interests are attributed as those of a officer or director.

11. Additionally, even assuming an exemption could be created for insulated non-limited partners, these petitioners, whose aliens originally filed as general partners, utterly fail to demonstrate that their alien partners were insulated from participating in the day-to-day management of the partnerships if we were to apply the non-attribution standards. The partnership agreements themselves, the best evidence of partner rights, contain no provisions that preclude the alien general partners from voting on all partnership business, participating in the management of the business or acting as an officer or employee of the partnership. Even assuming the limited partner non-attribution standards, of *Wilner and Scheiner* and the *Attribution Orders* applied, we find that the petitioners have failed to provide sufficient grounds to avoid treating these alien partners as officers or directors of the partnerships in question.[23]

D. The GTRW Partnership Decision

12. Citing *GTRW Partnership*, 2 FCC Rcd 4160 (Mob. Serv. Div. 1987) (*GTRW*), the petitioners argue that the Commission has previously allowed an applicant with alien partners to file an amendment correcting the Section 310(b)(3) deficiency. In *GTRW*, the partnership filed as a general partnership but later submitted an amendment pursuant to Section 1.65 of our rules informing the Commission that the partnership list filed with its application had omitted two partners. The amendment further stated that one of the originally named general partners was, in fact, an alien; it designated her, and one other originally named partner, as limited partners. All other partners remained general partners. The MSD accepted the amendment and granted GTRW's application, stating that "GTRW corrected, in a timely filed Section 1.65 amendment, the actual citizenship" of the limited partner and that the "non-disclosure of alien ownership in the original application was inadvertent." 2 FCC Rcd at 4161.

13. The *GTRW* decision on its face does not even address whether a general partnership with an alien general partner can amend its ownership structure to make the alien a limited partner. Nevertheless, from a review of GTRW's cellular application and pleadings filed in that proceeding, it is apparent that GTRW filed its application as a general partnership, later amended to make an alien a limited partner, and the MSD granted the application. Applying the standards we set forth in the *Cellular Lottery Rule Making*, *supra*, we cannot support the result reached by the MSD in *GTRW*.[24] Upon discovering that GTRW's application contained an alien general partner, the MSD should have returned the application and denied any subsequent corrective amendment. Accordingly, to the extent by inference *GTRW* can be viewed as reflecting policies that are inconsistent with the Commission's rules, we overrule it.[25]

E. Equal Protection

14. Various petitioners argue that dismissal of applications for alien ownership is improper because it denies the applicants (both aliens and U.S. citizens) their right to equal protection as guaranteed by the Due Process Clause of the Fifth Amendment.[26] Distinctions based on alienage in federal statutes are permissible as long as the statute is not "wholly irrational" in meeting a legitimate government purpose. *Matthews v. Diaz*, 426 U.S. 67, 83 (1976). With respect to the Communications Act, the United States Court of Appeals for the Seventh Circuit held that alien restrictions found elsewhere in the Act do not violate the Fifth Amendment. *Campos v. FCC*, 650 F.2d 890 (7th Cir. 1981).[27] The court in *Campos* only required a showing that the federal exemption of aliens was not wholly irrational in order to be upheld. Congress' intent, with regard to Section 310, was to protect the security of the airwaves in time of war. *Noe* at 741 (citing 68 Cong. Rec. 3037 (1927); *see also Coalition for the Preservation of Hispanic Broadcasting v. FCC*, 893 F.2d 1349 (D.C Cir. 1991). Indeed, no petitioner has questioned the national public interest established by Congress in Section 310(b)(3) of the Act to protect the security of domestic airwaves.[28]

15. Furthermore, the authority relied upon by the petitioners is inapposite. Both *Plyer v. Doe*, 457 U.S. 202 (1982), and *Takahashi v. Fish and Game Commission*, 334 U.S. 409 (1947), only suggest that a state cannot establish laws which discriminate against aliens without meeting a substantial governmental interest. The federal government is allowed more latitude to regulate aliens than are the states. The reason for this greater latitude is "predicated not merely on the fact that immigration is an exclusively federal interest, but also on the fact that the federal power is of a political nature subject to narrow judicial review." 650 F.2d at 894. As the U.S. Supreme Court noted in *Hampton v. Mow Sun Wong*, 426 U.S. 88 (1976), "there may be overriding national interests which justify selective federal legislation that would be unacceptable for an individual state." *Id.* at 100. In conclusion, there is a rational basis for the alien ownership restrictions and accordingly we find the petitioners' argument unsupported and without merit.[29]

F. Sacramento

16. When Sacramento filed its application, it was a limited partnership consisting of one general partner and 22 limited partners, one of which was an alien. Sacramento's application was dismissed because the alien limited partner was not sufficiently insulated under *Wilner & Scheiner* and the *Attribution Orders*. Specifically, the MSD stated that the alien limited partner was permitted to advise the partnership in day-to-day operations and to vote in the removal of the general partner without cause -- both prohibited powers under the attribution rules. *See* discussion, *supra*, at n.22 and accompanying text. Sacramento argues that its limited partners do not exercise control comparable to officers and directors.

17. While the Sacramento partnership agreement may provide certain indicia of insulation, it also contains elements of potential control that are not allowed by Section

310(b)(3) of the Act. *See Wilner & Scheiner*, 103 FCC 2d at 516; *see also PrimeMedia Broadcasting, Inc.*, 3 FCC Rcd 4293, 4294 (1988). The alien limited partner in Sacramento may advise the partnership in day-to-day activities and may vote to remove the managing general partner without cause. The authority to exercise either of these powers shows a high degree of involvement as both can directly involve the power to manage the day-to-day affairs of the partnership. Since the alien can both advise the managing partner and vote to remove him without cause, the managing partner stands under the threat of being removed if he does not follow the alien partner's advice. These are not the kind of rights enjoyed by an insulated limited partner, and they exceed the control allowable under Section 310(b)(3). While Sacramento claims that its limited partnership agreement complies with the California Limited Partnership Act, the standards for insulation under *Wilner & Scheiner Reconsideration Order* have not been met. The burden is on Sacramento to demonstrate that its partnership agreement does not provide the alien limited partner with sufficient insulation to fall outside the strictures of Section 310(b)(3). Sacramento has failed to meet that burden.[30] Therefore, we find the MSD was correct to return the application of Sacramento.

IV. CONCLUSION

18. In conclusion, we apply the rationale of *Wilner & Scheiner* that the statutory prohibition against alien ownership of cellular licenses pertains to partnerships as well as corporations, and that interests of non-limited partners will be considered comparable to those of an officer or director in a corporation. Therefore, any applicant with a non-limited alien partner is prohibited from being granted a license under Section 310(b)(3) of the Act. Additionally, a cellular applicant whose ownership includes a non-limited alien partner cannot later amend its application to cure that defect. Further, a limited partner must be sufficiently insulated in order not to be considered maintaining the control of an officer or director. Finally, the MSD's decision in *GTRW* may not be relied upon to support submission of an amendment that under Commission rules and policies should be dismissed. Therefore, we reject the petitioners' arguments.

V. ORDERING CLAUSES

19. Accordingly, WE AFFIRM our decision in *Continental Cellular* as modified herein that the Mobile Services Division was correct in returning the application filed by Continental Cellular and refusing Continental an opportunity to amend to correct the defect. It is therefore ORDERED that the Petition for Reconsideration, as supplemented, filed by Continental IS HEREBY DENIED.

20. IT IS FURTHER ORDERED that the Petitions for Reconsideration filed by 21st Century (Utah), 21st Century (Ind), Cells, Cellswitch, CRLP, Cellwave, CGSA, Electronics, Delta, Eastern, Federal, Independent, Jefferson, Moving Phones, Quadrangle, Sacramento, Silver Wings, USTP and Western ARE HEREBY DENIED.

FEDERAL COMMUNICATIONS COMMISSION

Donna R. Searcy
Secretary

APPENDIX A

The following applications have been consolidated with the Continental Cellular for consideration on the record:

21st CENTURY TELECOM
(Hereafter referred to as 21st Century (Utah))
File No. 10109-CL-P-675-A-88
Utah 3 - Juab

21st CENTURY TELECOM
(Hereafter referred to as 21st Century (Ind))
File No. 10311-CL-P-403-A-88
Indiana 1 - Newton

CELLS COMPANY L.P.
(Hereafter referred to as Cells)
File No. 10621-CL-P-366-A-89
Florida 7 - Hamilton

CELLSWITCH L.P.
(Hereafter referred to as Cellswitch)
File No. 10513-CL-P-460-A-89
Louisiana 7 - West Feliciana

CELLULAR REGIONAL LIMITED PARTNERSHIP
(Hereafter referred to as CRLP)
File No. 10266-CL-P-423-A-88
Iowa 12 - Winneshiek

CELLWAVE TELEPHONE SERVICES L.P.
(Hereafter referred to as Cellwave)
File No. 10625-CL-P-370-A-89
Florida 11 - Monroe

CGSA TELEPHONES
(Hereafter referred to as CGSA)
File No. 10511-CL-P-458-A-89
Louisiana 5 - Beauregard

CONTINENTAL ELECTRONICS
(Hereafter referred to as Electronics)
File No. 10104-CL-P-545-A-88
Nevada 3 - Storey

DELTA CELLULAR PARTNERS
(Hereafter referred to as Delta)
File No. 10613-CL-P-313-A-89
Alabama 7 - Butler

EASTERN CELLULAR SYSTEMS L.P.
(Hereafter referred to as Eastern)
File No. 10504-CL-P-440-A-89
Kansas 13 - Edwards

FEDERAL MOBILE RADIO
(Hereafter referred to as Federal)
File No. 10038-CL-P-319-A-88
Arizona 2 - Coconino

INDEPENDENT CELLULAR SYSTEMS L.P.
(Hereafter referred to as Independent)
File No. 10049-CL-P-699-A-88
Washington 7 - Skamania

JEFFERSON CELLULAR L.P.
(Hereafter referred to as Jefferson)
File No. 10449-CL-P-509-A-89
Missouri 6 - Marion

MOVING PHONES PARTNERSHIP L.P.
(Hereafter referred to as Moving Phones)
File No. 10265-CL-P-488-A-88
Minnesota 7 - Chippewa

QUADRANGLE COMMUNICATIONS
(Hereafter referred to as Quadrangle)
File No. 10407-CL-P-659-A-88
Texas 8 - Gaines

SACRAMENTO RSA LIMITED PARTNERSHIP
(Hereafter referred to as Sacramento)
File No. 10420-CL-P-672-A-89
Texas 21 - Chambers

SILVER WINGS 1988 L.P.
(Hereafter referred to as Sliver Wings)
File No. 10083-CL-P-611-A-88
Oregon 6 - Crook

U.S. RSA TELCO PARTNERS
(Hereafter referred to as USTS)
File No. 10174-CL-P-634-A-88
South Dakota 1 - Harding

WESTERN CELLTEL L.P.
(Hereafter referred to as Western)
File No. 10230-CL-P-427-A-88
Iowa 16 - Lyon

FOOTNOTES

[1] On April 24, 1990, Thomas Domencich and the Committee for a Fair Lottery filed a Motion to consolidate this proceeding with 22 other proceedings also involving alien ownership. On November 28, 1990, various counsel representing 17 of the applicants dismissed in those other proceedings also requested we consider the records in those proceedings with the one at bar, and requested the opportunity to present oral argument.

[2] Continental Cellular has, since originally filing it application, altered its ownership structure. Continental's successor in interest is Continental Alaska Limited Partnership.

[3] The record in this proceeding includes: (1) a Petition for Reconsideration filed by Continental on November 30, 1988; (2) Comments of Romulus Engineering filed February 13, 1989; (3) Comments on the Participation of Non-Citizen Principals in Cellular Applications filed by various legal counsel representing cellular applicants on November 3, 1989; (4) Further Comments on the Participation of Non-Citizen Principals in Cellular Applications filed by other legal counsel representing a cellular applicant on January 3, 1990; (5) Supplementary Comments of Continental filed November 28, 1990; (6) various related pleadings. As the issues raised by Continental, the applicants which were general partnerships when filed, Romulus Engineering and the commentors in the Participation of Non-Citizen Principals, are virtually identical, the parties will be referred to collectively as "the petitioners" unless specifically referred to by name. The petition filed by Sacramento RSA Limited Partnership (Sacramento) differs insofar as it was a limited partnership when it initially filed its application.

[4] We are not including the pleadings filed by FutureWave General Partners (File No. 10810-CL-P-615-A-89), Rural America General Partnership L.P. (File No. 10802-CL-P-560-A-89), or U.S. Telco Partners (File No. 10815-CL-P-620-A- 89) as requested by the Committee for a Fair Lottery as those proceedings involve different issues. Great Western Cellular Partners (File No. 10269-CL- P-492-A-90) has also been dismissed for violation of our alien ownership rules. As it also involves different alien ownership issues, it will not be included with the other dismissals in this Order.

[5] Public Notice, Report No. CL-88-168 (released September 27, 1988).

[6] The dismissal also cited Continental's failure to reveal all of its partners in its application. Given our disposition here it is unnecessary to address this issue.

[7] "Non-limited" partners refer to partners in a partnership without limited partners (such as Continental's partnership as originally filed) and to general partners within a limited partnership. *Wilner & Scheiner Reconsideration Order*, 1 FCC Rcd at note 4.

[8] *Id.* at n. 42 and accompanying text.

[9] By Public Notice (Report No. CL-91-21 (released October 26, 1990)), the Commission invited Continental to file comments in order to supplement the record.

[10] Section 310(b)(3) states in pertinent part:

(b) No . . . common carrier . . . license shall be granted to or held by--

* * *

(3) any corporation of which any officer or director is an alien or of which more than one-fifth of the captial stock is owned of record or voted by aliens or their representatives thereof or by any corporation organized under the laws of a foreign country.

[11] Various petitioners reason that their alien partners are from friendly nations and/or have close ties with the United States. The statute makes no distinction between resident and non-resident aliens; offers no exception depending on the length of the alien's U.S. residence; and provides no exemption because the alien is a citizen of a close ally of the United States. The restrictions of the statute constitute a flat prohibition against certain levels of alien ownership.

[12] Section 22.4 states in pertinent part:

(b) *Alien Ownership*. An authorization may not be granted to or held by:

* * *

(3) Any corporation of which any officer or director is an alien or of which more than one-fifth of the capital stock is owned of record or voted by aliens or their representatives or by a foreign government or representative thereof or any corporation organized under the laws of a foreign country.

[13] *See, e.g.*, Farragut Television Corp., 4 RR 2d 350 (1965) (policy holders of a mutual insurance company); Kansas City Broadcasting Co., 5 RR 2d 1057 (1952) (members of a church); Chicagoland TV Co., 4 RR 2d 747 (1965) (members of a labor union); and *Wilner & Scheiner, supra* (partnerships); PrimeMedia Broadcasters, Inc., 3 FCC Rcd 4293 (1988) (partnerships). *See also* Reexamination of the Commission's Rules and Policies Regarding the Attribution of Ownership Interests in Broadcast, Cable Television and Newspaper Entities, 97 FCC 2d 997, 1009 (1984), *reconsidered in part*, 58 Rad. Reg. (P & F) 2d 604 (1985), *further reconsidered*, 1 FCC Rcd 802 (1986) (*Attribution Orders)* (alien ownership prohibition "applies equally to all financial interests in all business forms of licensees").

[14] "Person" includes an individual, partnership, association, joint-stock company, trust, or corporation. 47 U.S.C. Section 153(i).

[15] The fact that all of these applicants except Continental were listed on public notices as tentative selectees is irrelevant to our determination in this case. Being named tentative selectee only reflects that an application has received a limited pre-screening by the staff. Each public notice indicates that the application may later be dismissed if found to be defective. *See, e.g.*, Public Notice, Report No. CL-89-254 (released August 24, 1989). *See also* 47 C.F.R. Section 22.26(b) (acceptance for filing "will not preclude the subsequent return or dismissal of the application if it is found to be defective or not in accordance with the Commission's rules.").

[16] Section 4(i) of the Communications Act of 1934 states that:

(i) The Commission may perform any and all acts, make such rules and regulations, and issue such orders, not inconsistent with this Act, as may be necessary in the execution of its functions.

Section 303 of the Act states in pertinent part that:

Sec. 303. Except as otherwise provided in this Act, the Commission from time to time, as public convenience, interest, or necessity requires shall

* * *

(r) Make such rules and regulations and prescribe such restrictions and conditions, not inconsistent with law, as may be necessary to carry out the provisions of this Act, or any international radio or wire communications treaty or convention insofar as it relates to the use of radio to which the United States is or may hereafter become a party.

[17] Although many of the petitioners argue that applicants for radio broadcast facilities have been allowed to amend their applications, the procedure associated with processing of certain applications in the Mass Media Bureau is quite different from the licensing procedure involved here. For example, the procedure for screening applications for FM broadcast service construction permits follows a three-step tenderability-acceptability-grantability review, which contains a thirty day amendment-as-of-right period following the public notice of acceptance for tender. During this period an applicant may file corrective amendments. *See* Report and Order on FM Application Processing, 58 RR 2d 776 (1985). This approach was not adopted for the processing of cellular applications in part because of the large volume of applications expected to be filed for the cellular service. *See* Cellular Lottery Reconsideration Order, 59 RR 2d 407, 410-411 (1985).

[18] There are differences between the use of the Section 22.918(b) minor amendment period in cellular proceedings and the amendment-as-of-right period in FM broadcast proceedings. The cellular minor amendment period does not allow a Part 22 applicant to correct an alien application defect, but submission of such a correction by an FM applicant during the amendment-as-of-right period is permitted. There are other differences between the processing procedures. For instance, during the amendment-as-of-right period, an FM broadcast applicant may amend its financial qualifications and correct multiple ownership problems whereas a cellular applicant may not do either. A cellular applicant may only file amendments which are considered minor, non-curative amendments as defined by Section 22.918 of the Commission's rules. It is well accepted that the Commission may utilize different processing standards for different services. *See e.g.*, David R. Williams d/b/a Industrial Communications, 53 Rad. Reg. 2d (P & F) 38 (1983), *aff'd sub nom.* Williams v. FCC, 721 F.2d 1424 (D.C. Cir. 1983).

[19] Question 12 on FCC Form 401 asks in pertinent part:

Does the applicant certify that it complies with Section 310(b) of the Communications Act of 1934, as amended, and Section 22.4 of the Commission's Rules regarding alien ownership and control?

All of the applicants in this proceeding answered "yes" to the above question.

[20] *See* PrimeMedia Broadcasting, Inc., *supra* (affirming dismissal of partnership application filed by aliens).

[21] For example, Continental's original partnership agreement, while placing no specific limitations on any of the partners' powers, stated that the day-to-day management would be conducted by one managing partner elected by a majority vote of the partners. This, it asserts, insulates the alien non-limited partner.

[22] *Wilner & Scheiner*, 103 FCC 2d at 520 n. 43. The Commission indicated it would use the standards of the *Attribution Orders* to determine whether a limited partner was insulated for Section 310(b)(3) purposes. The *Attribution Orders* required that in order for a limited partner's interest not to be attributed the partnership agreement must state, in express terms, that the exempt limited partner is prohibited from becoming actively involved in the management or operation of the communications business of the partnership. Moreover, the exempt limited partner must not be allowed to vote for the removal of a general partner except for cause. Additionally, the limited partnership agreement must bar the exempted limited partner from serving, in any material capacity, as an independent contractor or agent. Finally, the exempt limited partner cannot act as an employee

of the limited partnership if his or her functions, directly or indirectly, relate to the communications enterprises of the company.

[23] Continental disputes the Commission's conclusion in *Wilner & Scheiner Reconsideration Order* that a partner cannot by private contract insulate itself from management to exempt the partnership from Section 310(b) because any reliquishment of control of a non-limited partner's power would be "extremely unusual." 1 FCC Rcd at 14. However, as noted above, the Commission did not rely simply on the fact that such a contract would be unusual, but also said it had no authority to create such an exemption. *Id.* at 15.

[24] We are not by this decision, however, taking any action on the original GTRW license or GTRW's successors in interest since that grant is now final.

[25] Petitioners argue that we may disavow *GTRW* only prospectively. We disagree. The Commission is not bound to apply a decision issued on delegated authority that is contrary to the Commission's rules. *See e.g.*, Armor Family Broadcasting Group v. FCC, 918 F.2d 960 (D.C. Cir. 1990); Clyde W. Pierce, 4 FCC Rcd 2378 (1989). Despite the erroneous decision in *GTRW*, we believe the Commission's rules were clear that alien ownership defects could not be corrected and thus met the standards set forth in Salzer v. FCC, 778 F.2d 869 (D.C. Cir. 1985).

[26] We note that the Commission is among several federal agencies which Congress has mandated to regulate foreign ownership. *See e.g.*, 10 U.S.C. Section 2272 (no aeronautical design contract shall be awarded to a corporation with more than 25 percent alien ownership); 16 U.S.C. Section 797(e) (Federal Power Commission prohibited to issue licenses for dam construction to aliens or alien controlled entities); 30 U.S.C. Section 1015 (geothermal production leases on federal lands may be issued only to U.S. citizens or domestic corporations or governments); 33 U.S.C. Sections 1502(5), 1503(g) (only U.S. citizens and domestic corporations can own and operate a deepwater port); and 42 U.S.C. Sections 2133, 2134 (Nuclear Regulatory Commission may not issue licenses to any alien, alien controlled corporation, or foreign government).

[27] The court in *Campos* found that Section 303 of the Act, authorizing the Commission to prohibit aliens from obtaining amateur radio operator's licenses, does not violate the Fifth Amendment.

[28] We also reject the argument that U.S. citizens who are partners in partnerships with impermissible alien ownership are denied equal protection by dismissing the instant applications. United States citizens who join partnerships with aliens are not a suspect class and, therefore, Section 310(b) is constitutional insofar as it affects U.S. citizens for the same reasons that Section 310(b) is constitutional with respect to its treatment of aliens.

[29] Certain petitioners do contend that the threat posed by the alien ownership of cellular facilities is significantly less than the threat posed by the alien ownership of broadcast facilities. However, Section 310(b)(3) of the Act does not make such a distinction. Accordingly, the actual threat of any alien control may not be taken into consideration.

[30] Sacramento only refers generally to provisions within its partnership agreement which state the powers of the managing general partner instead of referring to any provision which limits the alien limited partner's power to the degree called for by the *Attribution Order*.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 88-584

In re Applications of

EDWIN A. BERNSTEIN	File No. BPH-870330NC
RADIO CENTER MORICHES LIMITED PARTNERSHIP	File No. BPH-870331MV
DAKK, INC.	File No. BPH-870331ND
FRIENDSHIP COMMUNICATIONS, LTD.	
HAMPTONS COMMUNICATIONS LIMITED PARTNERSHIP	File No. BPH-870415KY

For Construction Permit for New FM Station, Channel 241A, Center Moriches, New York

MEMORANDUM OPINION AND ORDER

Adopted: November 8, 1991; Released: November 20, 1991

By the Review Board: MARINO (Chairman), BLUMENTHAL and ESBENSEN.

1. By *Memorandum Opinion and Order*, 6 FCC Rcd 2875 (Rev. Bd. 1991) (*MO & O*), we requested that DAKK, Inc., the winner below, supplement the record in this proceeding so as to clarify certain matters surrounding its claim of reasonable assurance of financing. (Board Member Esbensen dissented, voting for an immediate remand on a financial issue.) DAKK has now supplemented the record,[1] but we must report that its responses have only raised substantial and material questions that will require a supplemental evidentiary hearing.

BACKGROUND

2. In the exceptions to the *Initial Decision*, 5 FCC Rcd 6629 (ALJ 1990), several of the applicants complained that the ALJ erred in his refusal to add financial issues against DAKK because of certain vagaries in its "commitment" letter from Midlantic North Bank. More specifically, that letter, dated March 23, 1987, (1) was personally addressed to DAKK's sole principal, Craig Foster ("Dear Craig") by the bank's (then) vice-president, Anthony Ambrutis, and that letter adverted to "our discussion with you," though the two had never in fact met; and (2) did not clearly indicate that the bank had reviewed and approved DAKK's loan collateral. *MO & O*, 6 FCC Rcd at 2876. In an effort to avert a possibly unnecessary remand hearing, the Board requested that DAKK supplement the record with material from the bank (*id*) :

> as to (1) what documentary materials the bank had before it when it issued its letter of March 1987; (2) what specific collateral it contemplated to secure the potential loan; and (3) whether it regards its March 1987 letter as genuinely intending to provide reasonable assurance of a firm commitment of a construction loan to DAKK, and in what precise dollar amount.

DAKK's RESPONSIVE PLEADINGS

3. DAKK's initial response was a motion for a two-week extension of time to secure material from Midlantic North bank and the applicant's assurance that "DAKK has been diligent in attempting to be responsive to the *MO & O*."[2] In its subsequently filed Response, DAKK supplied, *inter alia*, (1) a letter of June 19, 1991 from Anthony Ambrutis, the (former) Midlantic North vice-president who had signed the bank's letter of March 23, 1987; and (2) a letter of June 20, 1991 from Thomas G. Rabicki, Ambrutis' apparent successor at the bank. The June 19, 1991 Ambrutis letter supplied by DAKK recited that he had issued his March 1987 letter "within my authority" as bank vice-president; that the 1987 letter "was intended to clearly set forth the genuine interest of the Bank in providing financing"; that his personal references to "Craig" (Foster) were actually directed to DAKK, Inc; and that his 1987 letter's reference to an "unsubordinated loan" meant that the station's assets would serve as a collateral interest. The June 20, 1991 letter to DAKK from Rabicki stated:

> Dear Mr. Foster:
>
> Confirming our several conversations concerning your request of Midlantic/North to assist you in your financing attempts to construct and operate an FM station in Suffolk County, NY, we have been unable to locate any files relating to your earlier request made in 1987. As a result we are unable to respond specifically to the three questions in your letter of June 11, 1991.
>
> Mr. Anthony Ambrutis, who was a Vice-President of Midlantic National Bank/North at that time, issued the letter of March 23, 1987 as an officer of Midlantic National Bank/North.
>
> We trust this will assist you in your proceedings.

4. After a series of replies from DAKK's opponents, in which they continued to urge the insufficiency of Midlantic North's past (and present) commitment, the precise issue over which the parties had clashed in the exceptions seemed well-joined, and the Board was primed to resolve the disputed question of DAKK's reasonable assurance of a Midlantic North loan. However, in rebuttal to a Bernstein motion of July 1, 1991, DAKK filed on July 29, 1991, an opposition to that motion in which DAKK preliminarily reargued at length the sufficiency of that bank's 1987 letter, but subsequently advised the fo-

rum and the other parties *for the first time* that it does *not* rely upon the 1987 loan letter from Midlantic North because, on September 12, 1989, Midlantic North's vice-president, Thomas Rabicki, had written[3]:

> Dear Mr. Foster:
>
> Prior to resigning from Midlantic/North, Richard Cavaliero asked me to respond to your recent request for your company's financing needs to establish a new radio station for DAKK, Inc. As Mr. Cavaliero had discussed with you, based upon the fact that this is a start-up situation and located outside of the Bank's primary lending area, *it would not be something Midlantic would be interested in*.
>
> Nevertheless, concerning your request for financing, from Anthony Ambrutis, former officer of Midlantic, in March 1987, not having had the opportunity to discuss the situation with Mr. Ambrutis, I can only presume that he felt there may have been some potential for financing at which time he issued his letter of March 23, 1987. This non-binding letter, which you refer to in your correspondence of August 30, 1989 as "a reasonable assurance financing letter in FCC parlance," clearly sets forth any interest of financing the Bank may have had at the time.
>
> Thank you for considering Midlantic, and I wish you luck with your venture going forward.

5. Moreover, DAKK now advised that, in the wake of a July 31, 1989 petition to add a financial against it, DAKK had sought from Midlantic North a reaffirmation of Ambrutis' March 1987 commitment letter; but having been informed by Rabicki in August 1989 that the bank did not consider the 1987 Ambrutis letter to "be construed as a commitment letter" (*see supra* note 3) and in September 1989 that a loan to DAKK "would not be something Midlantic would be interested in" (*see supra* para. 4), DAKK had secured a substitute commitment from CVC Capital Management Corp. of New York City on October 26, 1989.[4]

DISCUSSION

6. Until the filing of DAKK's July 29, 1991 opposition pleading, DAKK had never informed the ALJ, the opposing parties, or the Board that it had not been relying, since August-September 1989, on Midlantic North for its basic financing. Instead, through *two* petitions to enlarge before the ALJ, its proposed findings of fact, its reply to the exceptions, its oral argument before the Board, and even in its supplemental filing in direct response to our May 1991 *MO & O*, DAKK argued only the efficacy of its Midlantic North loan "commitment," a putative assurance it knew to have been rescinded, in any event, nearly two years prior thereto.

7. The Board recognizes DAKK's implicit thesis that, inasmuch as its opponents were attacking only its original certification of reasonable assurance, and the sufficiency, *vel non*, of its March 1987 letter from Midlantic North, its multiple responses were honed narrowly to those specific attacks. We also appreciate the fact that DAKK appears to have acted briskly to secure alternative financing, once informed in 1989 that its reliance on a loan from Midlantic North was no longer tenable.

8. Still, we find DAKK's actions inexplicable. Even were we to agree that DAKK's responses, throughout, to the attacks on its 1987 Midlantic North loan commitment were "technically correct," a license applicant before the FCC has a duty to go beyond that level and to be fully forthcoming as to decisionally significant changes in its application. *RKO General, Inc. v. FCC*, 670 F.2d 215, 230-232 (D.C. Cir. 1981). Loss of a critical financial commitment is certainly of "decisional significance," and must be timely reported under 47 CFR § 1.65. *See Texas Communications Limited Partnership*, 6 FCC Rcd 5191, 5192 (1991). Although DAKK claims to have rather expeditiously secured alternative financing, the loss of its Midlantic North "commitment" should have been reported to the ALJ at that time.

9. But even if DAKK believes that its prior pleading responses to its opponents' attacks on its Midlantic North financing were technically correct, and that any reporting failure evinced no intent to conceal the loss of its original loan commitment, *see Valley Broadcasting Co.*, 4 FCC Rcd 2611, 2618 (Rev. Bd. 1989)(subsequent history omitted), [5] certain other of its actions are at least equally disconcerting. Thus, for example, although DAKK was a signatory to an April 1989 joint discovery motion in which each party agreed to produce all of its loan agreements, [6] DAKK provided the other parties with none of the 1989 correspondence between Midlantic North's Rabicki and Craig Foster, nor did it supply the 1989 correspondence between Foster and CVC Capital Management. We are at a loss to explain DAKK's reticence at that time, and continuously thereafter.

10. Additionally unsettling is DAKK's June 21, 1991 pleading Response to our *MO & O*. Although our *MO & O* directed it to provide evidence that Midlantic North "regards its March 1987 letter as intending to provide reasonable assurance of a firm commitment of a construction loan" (*see supra* para. 2), DAKK nowhere in that Response suggested that it no longer relied upon that bank for its vital financing. Indeed, to the extent that -- after our grant of an extension of time so that DAKK could ostensibly provide a *complete* response to our queries of the bank -- DAKK supplied only the cryptic letter of June 21, 1991 from Rabicki "[c]onfirming our conversations concerning . . . your financing attempts to construct and operate an FM station . . . " (*see supra* para. 3), neither the Board nor the other parties could infer that DAKK was *not* continuing to rely upon Midlantic North. Quite the contrary, in fact.

CONCLUSION

11. There is in law, and certainly before the FCC, perhaps a delicate membrane between "playing it close to the vest" and forcing the Commission (as well as opposing parties) to "play procedural games with those who come before it in order to ascertain the truth." *RKO General*, 670 F.2d at 229 (quoting FCC Brief). *See generally also David Ortiz Radio Corp.*, *supra* note 5 (failure to report loss of "reasonable assurance" in subsequent pleadings related to same subject matter raises question of intentional concealment). By its actions, DAKK has unfortunately given the Board little alternative but to remand this

case for supplemental hearing to ascertain whether DAKK has punctured that membrane, and whether the prognosis is terminal. Issues shall be heard:

(1) To determine whether DAKK has violated Section 1.65 of the Commission Rules, and whether any such violation reflected a deliberate attempt to conceal;

(2) To determine whether DAKK lacked candor in its prosecution of this case or in pleadings filed in this proceeding;

(3) To determine, in light of the foregoing, whether DAKK is qualified to be a Commission licensee.

12. Finally, so long as there must be held a supplemental evidentiary hearing, we will also ask the ALJ to take evidence on, and resolve, the question of whether DAKK has reasonable assurance of a firm commitment of a loan from CVC Capital Management. Just as with its original letter from Midlantic North, a key question remains as to whether DAKK has demonstrated adequate collateral to its financial source. *See Chapman Radio & Television Co.*, 70 FCC 2d 2063, 2072 (1979). [7] An issue shall be tried:

(4) To determine whether DAKK has reasonable assurance of a loan from CVC Capital Management, and whether it is basically financially qualified to be a licensee.

13. ACCORDINGLY, IT IS ORDERED, That this proceeding IS REMANDED to the Presiding Officer for a further hearing on the issues specified herein, and the preparation of a Supplemental Initial Decision; and'

14. IT IS FURTHER ORDERED, That the Motion to Supplement the Briefs and Arguments, filed May 6, 1991 by Edwin A. Bernstein; The Motion For Leave To Supplement Exceptions, filed June 17, 1991 by Hampton Communications Limited Partnership; The Motions to Dismiss, filed July 1, 1991 and August 5, 1991 by Edwin A. Bernstein; The Motion for Acceptance of Pleading out of time, filed July 29, 1991, by DAKK, Inc.; and responsive pleadings thereto; ARE DISMISSED as specified in note 1.

FEDERAL COMMUNICATIONS COMMISSION

Norman B. Blumenthal
Member, Review Board

FOOTNOTES

[1] DAKK's supplementation has spawned an avalanche of associated pleadings: (a) Motion To Supplement The Briefs And Arguments, filed May 6, 1991 by Bernstein; (b) Opposition to (a), filed May 14, 1991 by DAKK; (c) Motion For Extension of Time, filed June 7, 1991, by DAKK (previously granted); (d) Motion For Leave to Supplement Exceptions, filed June 17, 1991, by Hamptons; (e) Response To Review Board Request For Additional Information, filed June 20 and refiled June 21, 1991, by DAKK; (f) Supplement to (e) filed June 25, 1991, by DAKK; (g) Comments to (e), filed July 1, 1991, by Bernstein; (h) Motion To Dismiss, filed July 1, 1991, by Bernstein; (i) Comments on (e), filed July 5, 1991, by Friendship; (j) Motion For Acceptance of Pleading Out of Time, filed July 29, 1991, by DAKK; (k) Opposition to (h) filed July 29, 1991 by DAKK; (l) Reply to (k), filed August 5, 1991 by Bernstein; (m) Motion To dismiss Hampton's Application, filed August 5, 1991, by Bernstein; (n) Opposition to (m), filed August 19, 1991, by Hamptons; (o) Reply to (n), filed August 23, 1991, by Bernstein; (p) Supplement to (k), filed September 5, 1991, by DAKK; and (q) Comments on (p), filed September 11, 1991, by Bernstein. Apart from the DAKK Response (item (e)) and the comments thereupon specifically invited by our *MO & O*, 6 FCC Rcd at 2877, as well as DAKK's Opposition (item (k)), of which we take official notice under Section 1.65 of the Rules, we will dismiss the other pleadings as unauthorized. *See* Section 1.276(c); *Pleasant Hope Broadcasting Co., L.P.*, FCC 91R-100, adopted November 1, 1990, at para. 14. In that latter regard, the Board has been recently deluged with *post*-oral argument filings in numerous proceedings. Henceforth, the Board will follow the example of the Commission and summarily dismiss any pleading seeking to augment exceptions or to raise new matter, *cf. Texas Communications Limited Partnership*, 6 FCC Rcd 5191, 5194 n.1 (1991); *Sharron Annette Haley*, 6 FCC Rcd 4630 n.1 (1991), unless the pleading meets the standards of Section 1.229 of the Rules. *Great Lakes Broadcasting, Inc.*, 6 FCC Rcd 4331, 4332 (1991). A perfect example of pleadings we will henceforth dismiss is the Motion to Dismiss (item (h)). So far as we are aware, such motions (nowhere contemplated in the adjudicatory rules) might lie only where, *e.g.*, directed at another party's failure to prosecute or failure to have properly paid a fee.

[2] DAKK Motion For Extension of Time, *supra* note 1, at 1. More fully, DAKK therein asserted:

> There is good cause for this extension of time. The information requested by the Board relates to a financial letter of March 23, 1987 from Midlantic Bank. The author of the letter, Anthony Ambrutis, is no longer at the Bank and DAKK had previously been unable to locate him. Fortunately, DAKK found Mr. Ambrutis yesterday. DAKK is hopeful that his personal knowledge of the matter will enable the Board to have before it a more thorough record than that which was available to the Presiding Judge. DAKK has also made contact with the Midlantic official who will be responsible for providing such information as the bank possesses. DAKK's President, Craig Foster, will be meeting with that individual on June 12. Thus, DAKK has been diligent in attempting to be responsive to the *MO & O*.

Over the opposition of Edwin A. Bernstein, DAKK was provided a one-week extension to file its response. Letter of June 10, 1991 from Allan Sacks, Chief for Law to DAKK counsel (Board Member Esbensen, dissenting).

[3] DAKK Opposition To Motion To Dismiss, filed July 29, 1991, Exh. 9 (emphasis added). That pleading also appended an earlier (August 25, 1989) letter from Rabicki to DAKK which read (*id.*, Exh. 7):

> Dear Mr. Foster,
>
> This letter will serve to confirm that the above letter dated March 23, 1987, which was sent by Anthony Ambrutis, was not meant to be, and should not be con-

strued as a commitment letter. As set forth, in part, within the aforesaid letter, it was not contractually binding on the Bank.

[4] *See id.*, Exh. 13 (Letter of October 26, 1991 from Joerg G. Klebe, president, CVC Capital Management Corp. to Craig Foster).

[5] In the recent *David Ortiz Radio Corp. v. FCC*, No. 90-1412 (D.C. Cir. August 20, 1991), where the court remanded to determine whether an applicant intended to conceal the loss of a transmitter site, the court was more disconcerted by subsequent pleadings that failed to reveal the loss than by the original reporting failure. Indeed, the court remarked that "[h]ad [the applicant] merely remained silent . . . any charge of deliberate concealment might have been dismissed as 'mere speculation and surmise.'" Slip op. at 12.

[6] The parties had mutually agreed to provide each other with:

> All documents upon which the applicant relied in certifying to its financial qualifications. Dollar amounts may be masked.

Joint Motion For Production of Documents, April 18, 1989, at 6. That motion had earlier stipulated (*id.*, at 4-5; emphasis added):

> *This document request is continuing in nature, so as to require supplemental responses within twenty (20) days after obtaining or discovering additional documents*, or not later than the commencement of hearing, if (i) the document is within any of the categories of documents described below and was in existence as of the date of the applicant's initial document production but was not discovered until later, *or* (ii) *the document was not in existence as of the date of the applicant's initial document production but modifies or replaces a document previously produced by the applicant.*

In that regard, the Commission has held that truthfulness and full candor are as much expected in discovery as they are with respect to submissions to the Commission itself. *See Washington's Christian TV Outreach*, 99 FCC 2d 395, 400-401 (Rev. Bd. 1984)(subsequent history omitted); *WNST Radio*, 70 FCC 2d 1036, 1043 (Rev. Bd. 1978)(quoting *Publix Television Corp.*, 36 FCC 1215, 1219 (1964)).

[7] The October 26, 1989 letter from CVC's president, Joerg G. Klebe, to DAKK outlined to Foster several conditions for a loan, the most pertinent here being:

> 3. your executing and delivering a loan agreement, promissory note, and other loan and collateral documents and personal guarantees which shall be in form and substance satisfactory to CVC;
>
> 4. your meeting CVC's credit criteria at the time of the loan;
>
> 5. your contributing to the capital of DAKK Inc. a minimum $45,000;
>
> 6. your providing adequate collateral to secure CVC's loan to you; and
>
> 7. your meeting any other conditions that are reasonably designed to secure CVC's loan and that do not violate the regulations of the Small Business Administration.

DAKK Opposition, *supra* note 3, Exh. 13 at 1. While DAKK has supplied two subsequent letters from CVC to DAKK, one of June 27, 1991 and another of July 24, 1991, s e e id., Exhs. 15 & 16, suggesting that DAKK might have very recently augmented its showing to CVC, it remains unclear whether CVC is fully satisfied that DAKK has demonstrated adequate collateral and/or any other such security.

Before the
Federal Communications Commission
Washington, D.C. 20554

In re:

COX CABLE CSR-3538
HUMBOLDT, INC. CA0391
Fortuna, California

Petition for Special Relief

MEMORANDUM OPINION AND ORDER

Adopted: November 12, 1991; Released: November 20, 1991

By the Chief, Video Services Division:

1. On February 28, 1991, a request for waiver of the Commission's program exclusivity rules, §§76.92 - 76.161, was filed by the Mayor of Fortuna, California, Dean Lewis. Similar requests were also filed at the same time by the Mayor of Ferndale, California, Ron Richardson, and by the Mayor of the City of Rio Dell, California, Ernie Cannady. All three Humboldt County communities are served by Cox Cable Humboldt, Inc. (Cox Cable). An opposition to these requests was filed on March 22, 1991, by California Oregon Broadcasting, Inc., licensee of Station KAEF-TV (ABC, Channel 23), Arcata, California. Following several requests for extension of time, the Mayors filed a joint response to it on June 25, 1991.[1]

2. In his letter, Mayor Lewis states that his city, Fortuna, is located in Humboldt County, about 250 miles north of San Francisco and 175 miles west of Redding. Although Fortuna is somewhat closer to Redding than it is to San Francisco, all of the community's social, commercial, and historic ties are with San Francisco, not with Redding, according to Mayor Lewis. However, since June 1, 1990, Cox Cable has ceased retransmitting Station KGO-TV (ABC, Channel 7), San Francisco, California, following KAEF-TV's request for network nonduplication protection. Mayor Lewis states that since Cox Cable had previously eliminated both CBS and NBC programs from the San Francisco affiliates, his community no longer receives network coverage from any major metropolitan area. Moreover, Mayor Lewis states that, because KAEF has no local broadcast studio, it actually broadcasts programming from Station KRCR-TV (ABC, Channel 7), Redding, California. Since Redding is located 3.5 hours by car from Fortuna, on the other side of the Coastal Mountain Range, Mayor Lewis says its news coverage is as relevant to local residents as that from Boise, Idaho. Therefore, Mayor Lewis requests waiver of the Commission's regulations to compel Cox Cable to carry KGO-TV in its entirety.

3. In response, KAEF-TV notes that the station was off-the-air due to the financial failure of its previous owner, as well as a complete breakdown of station equipment, until April 26, 1990, when it resumed operations. The three communities now requesting waiver are all within KAEF-TV's thirty-five mile zone, and they have a combined population of more than 13,000 people, according to KAEF-TV. Furthermore, the station states that it was not carried by Cox Cable's systems in these communities prior to June 1, 1990, when Cox Cable also extended it nonduplication protection. KAEF-TV adds that it has not even requested syndicated exclusivity protection, but that all it seeks is treatment comparable to that afforded its network competitors from Eureka, California, Television Broadcast Stations KVIQ (CBS, Channel 6), and KIEM-TV (NBC, Channel 3), both of which receive nonduplication protection from Cox Cable. Moreover, according to KAEF-TV, Cox Cable already carries various nonnetwork programs, including local news and information from the following two television stations licensed to San Francisco: KPIX (CBS, Channel 5); KRON-TV (NBC, Channel 4); as well as from KTVU (Ind., Channel 2), Oakland, California. KAEF-TV also states that the cable signal quality of its programs is excellent, and that it would not be improved if these programs were transmitted by KGO-TV instead of by KAEF-TV. In addition, KAEF-TV notes that it has operated with substantial losses since its inception, and it ". . . estimates that it would suffer up to $250,000 annually in lost advertising revenues. . ." if, as a result of the Commission granting the instant waiver request, Cox Cable ceased carriage of the station. KAEF-TV adds that there presently is no exception in the network nonduplication rules for satellite stations, such as itself, and that creating one in this instance would be particularly unfair in light of its competition with the two Eureka VHF network affiliates, both of which already exercise this right on Cox Cable's systems. Finally, insofar as subscribers' preferences are concerned, KAEF-TV notes that on February 4, 1991, it began broadcasting five minutes of Humboldt County news daily at 5:40 and at 6:40 pm from its studio in Eureka at 540 E Street, and that commencing on March 30, 1991, it planned to add a thirty-minute weekly Eureka - Humboldt County news review program Saturdays at 6:00 pm. KAEF-TV notes that, of its five full-time employees, two are news reporters, and that when Cox Cable dropped KGO-TV, it received only 46 complaints (which amounted to approximately .004 percent of its subscriber base in petitioners' three communities).

4. In their joint reply, the Mayors submit a petition signed by more than 2,000 Humboldt County residents seeking carriage of KGO-TV by Cox Cable because ". . . we have no direct access to major network programming from the San Francisco Bay area." The Mayors add that Cox Cable's Manager, Dorothy Lovfald, previously said that she did not intend to add KGO-TV either on a full-time or on a part-time basis ". . . unless ordered to do so by the Commission." Since Cox Cable merely deleted duplicating network programs, but did not delete the stations entirely, when it received requests for network nonduplication protection against KRON-TV and KPIX, the Mayors speculate that KAEF-TV received "preferential treatment" from Cox Cable due to a ". . . long-term business relationship between the Manager, Vice President of Cox and the owners of Station KRCR(TV) and KAEF(TV). . .". The Mayors add that certain programs carried by KGO-TV, such as reruns and long-time running situation comedies, are more interesting than those carried by KAEF-TV, and they note that over one hundred complaints were filed with the City of Fortuna when Cox Cable ceased carriage of KGO-TV. According to the Mayors, ". . . in spite of Commission rules to the contrary. . ." KAEF-TV still has insufficient local programming to qualify as a truly local station. In addition, the Mayors note that KAEF-TV, as well as Station KFWU-TV

(ABC, Channel 8), Fort Bragg, California, are both satellites of KRCR-TV, which indicates that the three stations together have sufficient advertising income and wealth to remain viable in an area, such as Eureka-Arcata, which presently appears to be enjoying significant financial growth.[2] Finally, the Mayors note the similar factual circumstances in South Lake Tahoe, California, where cable subscribers ". . . are required, due to the Syndex rules, to watch major network programming originating in Nevada." According to the Mayors, KAEF-TV should have realized before it commenced broadcasting that ". . . the entire area was receiving adequate local coverage as well as national network programming. There was no further need for local programming of area news and items of interest."

5. Initially, we should note that the relief sought by petitioners, full-time carriage of KGO-TV by Cox Cable, is beyond our present ability to grant since our must carry rules have been found to be unconstitutional. *Century Communications Corp. v. FCC*, 835 F.2d 292 (D.C. Cir. 1987), *clarified*, 837 F.2d 517 (D.C. Cir. 1988), *cert. denied*, 108 S. Ct. 2014 (1988). In this regard, we note Cox Cable has affirmatively stated that it will not reinstitute carriage of KGO-TV ". . . unless ordered to do so by the Commission." Any deletion of television broadcast signals in their entirety is a unilateral decision by the cable operator involved, and it is not mandated by the Commission's Rules. In addition, the Commission has frequently repeated its belief that disruption of established viewing habits does not constitute a sufficient basis for waiver of its program exclusivity provisions. *KKTV, Inc.*, 6 FCC Rcd 3621, 3623 (1991); *Chambers Cable of Oregon, Inc.*, 5 FCC Rcd 5640, 5641 (1990); *Metro Cable Co.*, 64 FCC 2d 605 (1977). Further, as noted by KAEF-TV, there is no indication herein that the network programs it retransmits are in any way technically inferior to those provided by KGO-TV, and there is every indication from KAEF-TV's program logs that the program exclusivity provisions in this case are, as we had hoped, having the desired effect of promoting the public interest by serving to ". . . increase the diversity of programming options available to the public." *United Video Inc. v. FCC*, 890 F.2d 1173, 1181 (D.C. Cir. 1989). Consequently, the stated preferences of certain cable subscribers for full-time carriage of KGO-TV, without any of the deletions required by our rules, is not a sufficient basis to waive those rules. Finally, as the Commission previously indicated, the present program exclusivity rules are designed to recognize the value inherent in local stations' syndication and network rights to ensure that a telecommunications environment will be provided "that is more conducive over the long run to the production, diversity responsiveness, quality and distribution of programming in order to ensure that consumers receive an optimal mix of programming." *Docket No. 87-24*, 4 FCC Rcd at 2715 (footnote omitted). Absent convincing evidence to the contrary, we are unable to conclude that it would be in the public interest to waive the relevant rules or that the underlying rationale of the rules is not served by their application here. *See Chambers Cable of Oregon, Inc.*, 5 FCC Rcd 5640 (1990).

6. In view of the foregoing, we find that grant of the above petition is not in the public interest.

7. Accordingly, IT IS ORDERED, pursuant to §0.283 of the Commission's Rules, that the request for waiver of the Commission's program exclusivity rules filed February 14, 1991, on behalf of the California communities of Fortuna, Ferndale, and Rio Dell (CSR-3538) IS DENIED.

FEDERAL COMMUNICATIONS COMMISSION

Barbara A. Kreisman
Chief, Video Services Division
Mass Media Bureau

FOOTNOTES

[1] One attachment to this filing in support of the requested waiver was a letter dated June 5, 1991, from Norman C. Woods, Mayor, City of South Lake Tahoe, California.

[2] In their reply, the Mayors also question, for the first time, various matters relating to California Oregon Broadcasting, Inc's acquisition of Station KREQ(TV) Arcata, California in August 1989, including the licensee's compliance with the Commission's public inspection file requirements. Not only are these new matters improperly raised (see §1.45 of the Commission's rules), they are also not relevant to the issues under consideration in this special relief proceeding. Accordingly, these matters will be considered separately, after the licensee is afforded an opportunity to comment thereon.

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

UACC MIDWEST, INC.,
d/b/a UNITED ARTISTS
CABLE MISSISSIPPI
GULF COAST,
Complainant,

v. File No. PA-91-0005

SOUTH CENTRAL BELL
TELEPHONE COMPANY,
Respondent

ORDER

Adopted: November 14, 1991; Released: November 20, 1991

By the Deputy Chief, Accounting and Audits Division, Common Carrier Bureau:

1. By this Order we deny a motion by UACC Midwest, Inc., d/b/a United Artists Cable Mississippi Gulf Coast ("UACC") for Summary Disposition of the above-captioned complaint. We grant South Central Bell Telephone Company ("SCB") seven days within which to file a response to the complaint.

2. On September 10, 1991, UACC filed, pursuant to 47 U.S.C. § 224, the above-captioned pole attachment complaint against SCB regarding the pole attachment rates charged by SCB. SCB's response was due thirty days later, on October 10, 1991.[1] SCB did not file on that date. On October 25, 1991, UACC filed a Motion for Summary Disposition of the complaint.

3. On October 30, 1991, SCB filed an Opposition to UACC's Motion for Summary Disposition. SCB claims that it first learned of the complaint on October 30, 1991, through a telephone call to the Commission. SCB states that it did receive a service copy of the complaint dated September 9, 1991. According to SCB, because Section 1.47(b) of our Rules[2] permits service by mail to be made "on or before the day on which the document is filed", the service copy which SCB received may have been mailed at any time prior to UACC's filing its complaint. SCB claims, therefore, that the service copy cannot be deemed to be notice that a complaint had actually been filed.

4. SCB contends that it is entitled to receive notice from the Commission that a response is required, either through actual notice, pursuant to Section 208(a) of the Communications Act, or through constructive notice by our issuing a public notice of the filing of a pole attachment complaint.[3] SCB argues that due process of law requires that, in the absence of either actual or constructive notice, SCB cannot be held to have waived any rights in this proceeding. SCB wishes to respond to the complaint and asks that we deny UACC's motion.

5. On October 31, 1991, SCB filed, pursuant to Section 1.46, a motion for a thirty day extension of time to file a response to UACC's complaint. In its motion, SCB reiterates the reasons set forth in its Opposition to UACC's Motion for Summary Disposition for failing to file a timely response. In addition, SCB states that UACC will not be prejudiced by an extension of time because any relief that may be ordered in this proceeding will relate back to the date of filing of the complaint, and will include interest.

6. On November 1, 1991, UACC filed a Reply to SCB's Opposition to its Motion for Summary Disposition. UACC asserts that Section 208(a) of the Act does not apply to the procedures adopted for resolving pole attachment complaints. UACC states that the Commission suspended issuing public notices of pole attachment complaints in 1983, and that the lists that had been published were frequently published more than thirty days after the complaint and response were filed. UACC also notes that the public notices of the past "never delayed the response date, which always ran from the |c|omplaint." UACC concludes that because SCB admitted to having received a mailed service copy of the complaint which, according to UACC, included a copy of the complainant's fee transmittal form, SCB received actual notice. On November 4, 1991, counsel representing UACC filed a letter asking that we deny SCB's request for an extension of time and grant its Motion for Summary Disposition.

7. We reject SCB's claim that it failed to receive actual or constructive notice of UACC's complaint. Service of the complaint on SCB by mail on September 9, 1991 constituted actual notice of the complaint, and the requirements of due process were thereby satisfied. SCB is mistaken in its belief that it was entitled to delay its response until it was notified that the complaint had been accepted for filing. Section 1.1407(a) clearly states that "[r]espondent shall have 30 days *from the date the complaint was filed* within which to file a response."[4] SCB's reliance on the service requirement of Section 208(a) is misplaced. Pole attachment complaints filed pursuant to Section 224 of the Act are not governed by Section 208(a).

8. It is not the Commission's practice to grant motions for extension of time routinely, particularly where the motion itself is untimely. However, we will permit SCB an extension of time of seven days from the date of release of this Order to respond to UACC's complaint. We are charged under Section 224 of the Communications Act to "regulate the rates, terms, and conditions for pole attachments to provide that such rates, terms, and conditions are just and reasonable...."[5] We believe that it is in the public interest to determine the justness and reasonableness of the rate at issue in this case based on a

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[1] 47 C.F.R. § 1.1407(a).
[2] 47 C.F.R. § 1.47(b).
[3] *See Opposition to Motion for Summary Disposition*, PA 91-0005, dated October 30, 1991 at 2, n.2, *referring* to Adoption of Rules for the Regulation of Cable Television Pole Attachments, 72 FCC 2d 59, 75 (1979).
[4] 47 C.F.R. § 1.1407(a) (emphasis added).
[5] 47 U.S.C. § 224(b)(1).

full record. An extension of seven days will not prejudice UACC. We emphasize, however, that in the future we will expect parties to pole attachment complaints to respond to pleadings within our established deadlines.

9. Accordingly, IT IS ORDERED, pursuant to Section 1.46 of the Commission's Rules and to the authority delegated by Section 0.291 of the Commission's Rules, 47 C.F.R. §§ 1.46, 0.291, that SCB's Motion for Extension of Time IS GRANTED to the extent indicated herein.

10. IT IS FURTHER ORDERED, pursuant to Sections 0.291 and 1.1407 of the Commission's Rules, 47 C.F.R. §§ 0.291, 1.1407, that UACC's Motion for Summary Disposition IS DENIED.

FEDERAL COMMUNICATIONS COMMISSION

Clifford M. Rand
Deputy Chief, Accounting and Audits Division
Common Carrier Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

VICKSBURG VIDEO,
INCORPORATED
Complainant,

v. File No. PA-91-0007

SOUTH CENTRAL BELL
TELEPHONE COMPANY,
Respondent

ORDER

Adopted: November 14, 1991; Released: November 20, 1991

By the Deputy Chief, Accounting and Audits Division, Common Carrier Bureau:

1. By this Order we grant South Central Bell Telephone Company ("SCB") seven days within which to file a response to the above-captioned complaint filed by Vicksburg Video, Incorporated ("Vicksburg").

2. On October 1, 1991, Vicksburg filed, pursuant to 47 U.S.C. § 224, the above-captioned pole attachment complaint against SCB regarding the pole attachment rates charged by SCB. SCB's response was due thirty days later, on October 31, 1991.[1] SCB did not file on that date.

3. Instead, on October 31, 1991, SCB filed, pursuant to Section 1.46, a motion for a thirty day extension of time to file a response to Vicksburg's complaint. SCB claims that it first learned of the complaint on October 30, 1991, through a telephone call to the Commission. SCB states that it did receive a service copy of the complaint dated September 30, 1991. According to SCB, because Section 1.47(b) of our Rules[2] permits service by mail to be made "on or before the day on which the document is filed", the service copy which SCB received may have been mailed at any time prior to Vicksburg's filing its complaint. SCB claims, therefore, that the service copy cannot be deemed to be notice that a complaint had actually been filed.

4. SCB contends that it is entitled to receive notice from the Commission that a response is required, either through actual notice, pursuant to Section 208(a) of the Communications Act, or through constructive notice by our issuing a public notice of the filing of a pole attachment complaint.[3] SCB argues that due process of law requires that, in the absence of either actual or constructive notice, SCB cannot be held to have waived any rights in this proceeding. SCB wishes to respond to Vicksburg's complaint and states that Vicksburg will not be prejudiced by an extension of time because any relief that may be ordered in this proceeding will relate back to the date of filing of the complaint, and will include interest.

5. We reject SCB's claim that it failed to receive actual or constructive notice of Vicksburg's complaint. Service of the complaint on SCB by mail on September 30, 1991 constituted actual notice of the complaint, and the requirements of due process were thereby satisfied. SCB is mistaken in its belief that it was entitled to delay its response until it was notified that the complaint had been accepted for filing. Section 1.1407(a) clearly states that "[r]espondent shall have 30 days *from the date the complaint was filed* within which to file a response."[4] SCB's reliance on the service requirement of Section 208(a) is misplaced. Pole attachment complaints filed pursuant to Section 224 of the Act are not governed by Section 208(a).

6. It is not the Commission's practice to grant motions for extension of time routinely, particularly where the motion itself is untimely. However, we will permit SCB an extension of time of seven days from the date of release of this Order to respond to Vicksburg's complaint. We are charged under Section 224 of the Communications Act to "regulate the rates, terms, and conditions for pole attachments to provide that such rates, terms, and conditions are just and reasonable...."[5] We believe that it is in the public interest to determine the justness and reasonableness of the rate at issue in this case based on a full record. An extension of seven days will not prejudice Vicksburg. We emphasize, however, that in the future we will expect parties to pole attachment complaints to respond to pleadings within our established deadlines.

7. Accordingly, IT IS ORDERED, pursuant to Section 1.46 of the Commission's Rules and the authority delegated by Section 0.291 of the Commission's Rules, 47 C.F.R. §§ 1.46, 0.291, that SCB's Motion for Extension of Time IS GRANTED to the extent indicated herein.

FEDERAL COMMUNICATIONS COMMISSION

Clifford M. Rand
Deputy Chief, Accounting and Audits Division
Common Carrier Bureau

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[1] 47 C.F.R. § 1.1407(a).
[2] 47 C.F.R. § 1.47(b).
[3] *See Motion for Extension of Time*, PA 91-0007, dated October 31, 1991 at 2, n.2, *referring* to Adoption of Rules for the Regulation of Cable Television Pole Attachments, 72 FCC 2d 59, 75 (1979).
[4] 47 C.F.R. § 1.1407(a) (emphasis added).
[5] 47 U.S.C. § 224(b)(1).

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

TELECABLE ASSOCIATES,
INCORPORATED
Complainant,

v. File No. PA-91-0006

SOUTH CENTRAL BELL
TELEPHONE COMPANY,
Respondent

ORDER

Adopted: November 14, 1991; Released: November 20, 1991

By the Deputy Chief, Accounting and Audits Division, Common Carrier Bureau:

1. By this Order we grant South Central Bell Telephone Company ("SCB") seven days within which to file a response to the above-captioned complaint filed by Telecable Associates, Incorporated ("Telecable"). We deny Telecable's request that we deny SCB's Motion for Extension of Time.

2. On October 2, 1991, Telecable filed, pursuant to 47 U.S.C. § 224, the above-captioned pole attachment complaint against SCB regarding the pole attachment rates charged by SCB. SCB's response was due thirty days later, on November 1, 1991.[1] SCB did not file on that date.

3. On October 31, 1991, SCB filed, pursuant to Section 1.46, a motion for a thirty day extension of time to file a response to Telecable's complaint. SCB claims that it first learned of the complaint on October 30, 1991, through a telephone call to the Commission. SCB states that it did receive a service copy of the complaint dated October 1, 1991. According to SCB, because Section 1.47(b) of our Rules[2] permits service by mail to be made "on or before the day on which the document is filed", the service copy which SCB received may have been mailed at any time prior to Telecable's filing its complaint. SCB claims, therefore, that the service copy cannot be deemed to be notice that a complaint had actually been filed.

4. SCB contends that it is entitled to receive notice from the Commission that a response is required, either through actual notice, pursuant to Section 208(a) of the Communications Act, or through constructive notice by our issuing a public notice of the filing of a pole attachment complaint.[3] SCB argues that due process of law requires that, in the absence of either actual or constructive notice, SCB cannot be held to have waived any rights in this proceeding. SCB wishes to respond to Telecable's complaint and states that Telecable will not be prejudiced by an extension of time because any relief that may be ordered in this proceeding will relate back to the date of filing of the complaint, and will include interest. On November 4, 1991, counsel representing Telecable filed a letter asking that we deny SCB's request for an extension of time.

5. We reject SCB's claim that it failed to receive actual or constructive notice of Telecable's complaint. Service of the complaint on SCB by mail on October 1, 1991 constituted actual notice of the complaint, and the requirements of due process were thereby satisfied. SCB is mistaken in its belief that it was entitled to delay its response until it was notified that the complaint had been accepted for filing. Section 1.1407(a) clearly states that "[r]espondent shall have 30 days *from the date the complaint was filed* within which to file a response."[4] SCB's reliance on the service requirement of Section 208(a) is misplaced. Pole attachment complaints filed pursuant to Section 224 of the Act are not governed by Section 208(a).

6. It is not the Commission's practice to grant motions for extension of time routinely, particularly where the motion itself is untimely. However, we will permit SCB an extension of time of seven days from the date of release of this Order to respond to Telecable's complaint. We are charged under Section 224 of the Communications Act to "regulate the rates, terms, and conditions for pole attachments to provide that such rates, terms, and conditions are just and reasonable...."[5] We believe that it is in the public interest to determine the justness and reasonableness of the rate at issue in this case based on a full record. An extension of seven days will not prejudice Telecable. We emphasize, however, that in the future we will expect parties to pole attachment complaints to respond to pleadings within our established deadlines.

7. Accordingly, IT IS ORDERED, pursuant to Section 1.46 of the Commission's Rules and the authority delegated by Section 0.291 of the Commission's Rules, 47 C.F.R. §§ 1.46, 0.291, that SCB's Motion for Extension of Time IS GRANTED to the extent indicated herein.

FEDERAL COMMUNICATIONS COMMISSION

Clifford M. Rand
Deputy Chief, Accounting and Audits Division
Common Carrier Bureau

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[1] 47 C.F.R. § 1.1407(a).
[2] 47 C.F.R. § 1.47(b).
[3] *See Motion for Extension of Time*, PA 91-0006, dated October 31, 1991 at 2, n.2, *referring* to Adoption of Rules for the Regulation of Cable Television Pole Attachments, 72 FCC 2d 59, 75 (1979).
[4] 47 C.F.R. § 1.1407(a) (emphasis added).
[5] 47 U.S.C. § 224(b)(1).

Before the
Federal Communications Commission
Washington, D.C. 20554

PUBLIC NOTICE

Released: November 19, 1991

SOUTHWESTERN BELL TELEPHONE COMPANY FILES PETITION FOR RECONSIDERATION OF COMMON CARRIER BUREAU ORDER RELATING TO AFFILIATE TRANSACTIONS

On November 4, 1991, Southwestern Bell Telephone Company (SWB) filed a Petition for Reconsideration of a Common Carrier Bureau Order on Reconsideration (Order) released October 4, 1991 (DA 91-1252). In this Order the Bureau states that all affiliate transactions must be included in the cost allocation manuals (CAMs) filed by the local exchange carriers for the separation of regulated and nonregulated costs. In its petition, SWB alleges that the Bureau has changed an existing rule without following relevant rulemaking procedures. SWB claims that this Order is inconsistent with previous Commission orders relating to affiliate transactions.

Interested parties may file comments on SWB's petition by **December 18, 1991.** Replies should be filed by **January 2, 1992.** Comments should reference AAD 91-75. A copy of each pleading should be sent to Gene Dougherty, FCC, Common Carrier Bureau, 2000 L Street, N.W., Room 257, Washington, D.C. 20554 and the Downtown Copy Center (DCC), 1114 21st Street, N.W., Washington, D.C. 20036, (202) 452-1422. Copies are available for public inspection and copying in the Accounting and Audits Division public reference room, 2000 L Street, N.W., Room 812, Washington, D.C. Copies are also available from DCC.

For further information contact Gene Dougherty, (202) 632-7500.

Before the
Federal Communications Commission
Washington, D.C. 20554

In re Application of

FORT MOJAVE INDIAN TRIBE — File No. 10051-CL-P-318-B-88

For facilities in the Domestic
Public Cellular Telecommunications
Radio Service on Frequency Block B,
in Market No. 318,
Arizona 1 - Mojave

MEMORANDUM OPINION AND ORDER

Adopted: November 8, 1991; Released: November 20, 1991

By the Commission:

I. BACKGROUND

1. On November 9, 1988, the Fort Mojave Indian Tribe (Mojave Tribe) won the lottery and subsequently was announced tentative selectee for frequency Block B to serve Rural Service Area No. 318 (Arizona 1 - Mojave)[1] in the Domestic Public Cellular Radio Telecommunications Service.[2] *See* Public Notice CL-89-29 (released November 10, 1988). Citizens Utilities Company (Citizens), a mutually exclusive applicant, filed a petition to deny the Mojave Tribe's application on March 13, 1989.[3] Citizens argues that the application should be denied on five grounds: (1) the Mojave Tribe is ineligible to apply for the wireline cellular authorization because it is not a wireline common carrier; (2) the application is a sham in which the Mojave Tribe is not the real party in interest, and material misrepresentations have been made; (3) two other companies actually filed the application on behalf of the Mojave Tribe, but lacked the legal authority to do so; (4) the Mojave Tribe is not financially qualified; and (5) grant of the application is not in the public interest. In the alternative Citizens argues that the application should be designated for hearing on real party in interest and misrepresentation issues.

II. ELIGIBILITY

A. Contentions of the Parties

2. In support of its petition to deny, Citizens states that at the time the Mojave Tribe filed its application it had never provided public landline telephone service to anyone, and has not initiated any such service since filing its application. Therefore, Citizens maintains, the Mojave Tribe does not meet the requirements of Section 22.902(b) for applying as a wireline cellular carrier. In addition, Citizens argues such an eligibility defect cannot be cured by subsequent amendment. Moreover, according to Citizens, even if the Mojave Tribe had initiated landline service within the Mojave Reservation, such service would not constitute public landline telephone service because the public has no right to enter the reservation.

3. Citizens argues that the Certificate of Convenience and Necessity issued under tribal law by the Mojave Tribal Council to construct, operate and maintain a wireline telecommunications system within the Reservation was a sham, executed just two days before the application was filed and before the creation of Fort Mojave Telecommunications. *See* para. 5 *infra*. Moreover, Citizens maintains, it would make a mockery of the Commission's processes for the Commission to find that the Mojave Tribe provided local telephone service within the meaning of Section 22.902(b) solely because it issued itself a certificate shortly before its application was filed.[4]

4. In response, the Mojave Tribe states that it is a federally recognized Indian tribe, invested with all rights and prerogatives attendant thereto including the authority to issue a certificate of public convenience and necessity. The Mojave Tribe is governed by the Fort Mojave Tribal Council and is organized in accordance with the Constitution and Bylaws of the Mojave Tribe. According to the Mojave Tribe, "it has embarked on a concerted effort to assert greater control over its economic destiny by undertaking to provide basic utility services to its Reservation and surrounds." With respect to the provision of telecommunications services, the Tribe states that it desires to increase the availability of telephone service to residential and commercial customers including Indian homes, churches and schools to enable the Tribe to achieve further economic development and generate additional revenues.

5. The Mojave Tribe asserts that with the assistance of National Companies and Associated Research[5] the Mojave Tribe prepared the cellular application. The application was reviewed by the Tribal Council and was executed by Llewellyn Barrackman, Vice-Chairperson of the Council. On October 28, 1988, subsequent to filing the application, the Tribal Council chartered Fort Mojave Telecommunications, Inc. (Mojave Telco) as its agent to provide telecommunications services, including landline telephone services, cable television and cellular services.

6. According to the Mojave Tribe, nothing in section 22.902(b) or interpretative case law requires a wireline company to be actually providing service at the time of the filing of the application. The Mojave Tribe adds that it meets the requirement of section 22.902(b) because it is a lawfully certificated common carrier[6] in the business of providing public landline message telephone service.[7]

B. Discussion

7. Section 22.902(b) in pertinent part states:

> . . . Common carriers engaged directly or indirectly in the business of affording public landline message telephone service will be assigned frequencies from cellular System B in those areas in which they provide such landline service in some portion of the cellular market . . . .

Section 22.2 of the Commission's rules defines the term wireline common carrier as follows:

> Common carriers which are in the business of providing landline local exchange telephone service...

8. In adopting this separate allocation for wireline carriers, the Commission stated that it was convinced that the separate allocation is the most practical way to make cellular service available to the public in the most expeditious manner possible. The Commission considered that much of the successful research and development in the mobile communications field have come from wireline carriers. Therefore, wireline carriers were in the best position to place cellular systems in operation around the country on a prompt basis. *Cellular Communications Systems*, 86 FCC 2d 469, 488-89 (1981). The Commission decided to consider a wireline applicant eligible to apply only in those markets in which it is certified as a wireline carrier to diminish the need for comparative hearings for wireline frequencies by limiting the number of wirelines that could file in a market. *Id.* at 490 n. 56. *See* also *Cellular Communications Systems, Reconsideration*, 89 FCC 2d 58, 70 (1982). The Commission also concluded that it considered cellular to be an extension of local exchange service, and expected that wireline carriers would be able to rely on their expertise and knowledge about their individual service areas to make quality cellular service available to their communities in an expeditious manner. *Id.* at 71.

9. When the Commission decided to use lotteries for the selection of mutually competing cellular applications, it maintained the wireline set aside, to ensure that rural telephone companies were not precluded from providing cellular service. The Commission stated that it was concerned with the continued financial viability of small telephone companies which is necessary to achieve the Commission's universal service goal. *Cellular Lotteries*, 98 FCC 2d 175, 192-98 (1984). *See also Rules for Rural Cellular Service*, 2 FCC Rcd 3366, 3369 (1987).

10. We conclude that applicants for wireline cellular frequencies must be providing landline local exchange telephone service at the time of filing an application in order to be eligible for those frequencies. We cannot determine whether an applicant has a presence in a market if it is not providing landline local exchange telephone service in that market. Although in *Cellular Communications Systems*, *supra*, the Commission referred to a wireline carrier that is "certified" in the area in which the Block B license is sought, there is no indication that certification is the sole criteria for determining eligibility to apply for a Block B license. *See, e.g., Cellular Communications Systems*, 86 FCC 2d at 490; *Cellular Communication Systems Reconsideration*, 89 FCC 2d at 71; *Cellular Lotteries*, 98 FCC 2d at 192-98.

11. Other Commission decisions also support our conclusion that in order to be eligible, a wireline must be in the business of providing local exchange telephone service at the time of filing its application. For instance, in *The Offshore Telephone Co*, 65 Rad. Reg. 2d (P&F) 54 (1988), the Commission affirmed the dismissal of Offshore's application because the applicant only provided microwave services in the market and not public landline service as required by Section 22.902(b). In *Montgomery Independent Cellular Telephone Company, Inc*, 4 FCC Rcd 2323 (1989) (*Montgomery*), the Commission affirmed dismissal of a wireline cellular application because the applicant was not a provider of landline wireline service in the MSA, citing *Advanced Mobile Phone Service Inc. (Los Angeles)*, 93 FCC 2d 683, 685 (1983). *See also Beehive Cellular Inc.*, 2 FCC Rcd 4505 (Com. Car. Bur. 1987).

12. The Mojave Tribe admits that it was not providing landline local exchange telephone service at the time it filed its application for the Arizona 1 RSA. Therefore, we must conclude that it was not a wireline carrier within the meaning of the requirements of Section 22.902(b) of the rules at the time it filed its application and, thus, could not apply for the wireline frequencies in the cellular service. Failure to comply with eligibility requirements renders the application defective and subject to dismissal. Such defective applications cannot be amended to correct such defects.[8] *See Montgomery*, 4 FCC Rcd at 2326. *See also, Rem Communications*, 3 FCC Rcd 3705 (1988).

III. WAIVER REQUEST

A. Contentions of the Parties

13. The Mojave Tribe argues that even if Section 22.902(b) requires a cellular applicant to be providing service at the time of filing, the rule should not be applicable to the special circumstances of an Indian Tribe. According to the Mojave Tribe, the rule conflicts with Federal laws and policies which encourage tribal self-sufficiency and grant Indian tribes exclusive sovereignty over their lands. Therefore, the Mojave Tribe argues, Section 22.902(b) should be waived in the unique circumstances of this case. Moreover, according to the Mojave Tribe, the waiver will enhance the underlying purpose of the wireline set aside by encouraging participation by smaller telephone companies, including those run by Indian tribes, thus promoting the Commission's pro-competitive policies. This would also encourage tribal self-sufficiency.

14. Citizens argues that the waiver request is defective because the affirmative showings required by section 22.19(a) of the rules were not made.[9] Specifically, Citizens argues that the purpose of the wireline set-aside would be frustrated by a grant of the Mojave Tribe's waiver request by precluding a telephone company from providing cellular service. Similarly, Citizens alleges, the Mojave Tribe cannot show the lack of a reasonable alternative to a grant of its waiver request since the Mojave Tribe was free to apply for a nonwireline authorization. Finally, Citizens contends, the Mojave Tribe has not shown that application of section 22.902(b) would be inequitable, unduly burdensome or contrary to the public interest. Since the Mojave Tribe lacks expertise in the telephone business and there is a dispute between the Mojave Tribe and the Arizona Commission regarding certification proceedings, these factors will cause delays in providing cellular service to the public.[10]

B. Discussion

15. Section 22.19 provides that requests for waiver will not be granted except upon an affirmative showing:

> (i) that the underlying purpose of the rule will not be served, or would be frustrated, by its application in a particular case, and that grant of the waiver is otherwise in the public interest; or (ii) that the unique facts or circumstances of a particular case render application of the rule inequitable, unduly

burdensome or otherwise contrary to the public interest. Applicants must also show the lack of a reasonable alternative.

16. As discussed above, the wireline frequency set aside serves multiple Commission policies. It provides for expediting the provision of cellular service to the public while at the same time fostering competition by providing for the participation of both large and small telephone companies in the provision of cellular service.

17. A waiver in this case will undermine the policies served by the rule, not further those policies. *See WAIT Radio v. FCC*, 418 F.2d 1153 (D.C. Cir. 1969); *see also WITN, Inc. v FCC*, 849 F.2d 1521, 1525 (D.C. Cir. 1988). Application of the rule in this case promotes our objectives of guaranteeing the participation of wireline companies in the provision of cellular services in this market. Unlike the wireline companies with a presence in the market, the Mojave Tribe does not have the infrastructure in place nor the demonstrated expertise from previous operations necessary to initiate service expeditiously, including knowledge about the service area. Moreover, if we granted a waiver in this case we would preclude all the independent and small rural telephone companies, who are in the business of providing landline local exchange telephone service, from having a fair opportunity to provide cellular service in this market. These goals are exactly what the wireline set aside sought to promote. *See Cellular Communications Systems*, 86 FCC 2d 469, 488-89 (1981), *recon.* 89 FCC 2d 58, 70 (1982). Therefore, we conclude that waiver of the rule in this case would not be in the public interest.[11]

18. Moreover, the Mojave Tribe had in the past, and continues to have, alternatives which do not necessitate a waiver. The Mojave Tribe could have applied to provide cellular service for the nonwireline block of the cellular frequencies. The Mojave Tribe may also approach the ultimate licensee for either block of frequencies to establish their own cellular system on the reservation during the five-year fill-in period.[12] Additionally, after the five-year fill-in period expires in this RSA the Mojave Tribe may apply to provide cellular service to any unserved areas. Therefore, we conclude that application of the rule to the Mojave Tribe is not unduly harsh or burdensome. Therefore, we must conclude that waiver of the rule would be contrary to the public interest.

19. We recognize that federal statutes evidence a congressional goal of fostering tribal self-government and economic development, (25 U.S.C. Section 1, *et seq.*) but we believe that these policies does not, by themselves, justify abrogation of the purpose behind Section 22.902(b) of the rules, which was promulgated pursuant to the Communications Act of 1934.[13]

IV. CONCLUSIONS

20. We conclude that the Mojave Tribe was not providing landline local exchange telephone service at the time it filed the application and was consequently not qualified to apply for the wireline cellular frequencies. We also conclude that waiver of the eligibility requirements of Section 22.902(b) is not in the public interest. Failure to comply with eligibility requirements renders the application defective and it must be dismissed. Such defective applications cannot be amended to correct such defects.[14] *See Montgomery*, 4 FCC Rcd at 2326. *See also Rem Communications*, 3 FCC Rcd 3705 (1988). Since these conclusions are dispositive of the application we need not address the other issues raised by the petitioner.

V. ORDERING CLAUSES

21. ACCORDINGLY, IT IS ORDERED, that the application of Fort Mojave Indian Tribe, File No. 10051-CL-P-318-B-88 IS DISMISSED.

22. IT IS FURTHER ORDERED, that the waiver request filed by the Mojave Tribe is hereby DENIED.

23. IT IS FURTHER ORDERED, that the petition to deny filed by Citizen's Utilities Company, IS GRANTED.

FEDERAL COMMUNICATIONS COMMISSION

Donna R. Searcy
Secretary

FOOTNOTES

[1] This Rural Service Area (RSA) includes, but is not limited to, the Fort Mojave Indian Reservation.

[2] The application was filed on July 28, 1988.

[3] Citizens is a wireline carrier in this market. The other three companies who also filed mutually exclusive applications for RSA No. 318 support Citizens' petition.

[4] Citizen argues that the Tribal Certificate has no validity because Citizens holds a certificate of Convenience and Necessity issued in 1934 by the Arizona Commission, to provide service inside the reservation and has provided telephone service to and within the Fort Mojave Indian Reservation for years without a Tribal Certificate.

[5] Two companies which provide technical and engineering services.

[6] The Mojave Tribe asserts they erroneously issued a Certificate of Convenience and Necessity to Mojave Telco. The Tribe alleges that the clear intent of the Tribe was to authorize itself to provide landline telephone service. This intent was also expressly stated by the Mojave Tribe in the reissued Certificate, the Tribe argues.

[7] At the time it filed its Opposition to the Petition to Deny on April 18, 1989, the Mojave Tribe contends that a DMS-10 digital switch (class 5 end office) is in place 1,442 feet inside the reservation boundary, and a distribution line is being laid from the switch to the initial subscribers.

[8] Section 22.20(a)(2) provides that an application will be deemed defective and unacceptable for filing if the application does not comply with the Commission's rules or specific requests for additional information.

[9] Section 22.19 generally requires that waiver requests demonstrate that the underlying purpose of the rule will not be served by its application in a particular case, or that the unique facts or circumstances of a particular case render application of the rule contrary to the public interest. Waiver requests must also demonstrate lack of a reasonable alternative to grant.

[10] Southwestern Bell Mobile Systems, Inc. (Southwestern Bell) filed an opposition to the waiver request asserting arguments similar to those presented by Citizens. Southwestern does not have standing to intervene in the Arizona-1 proceeding since it was not an applicant in that market. We considered Southwest-

ern's pleading as informal comments and therefore deny the Motion to Strike filed by Indian Cellular Telephone Company (an applicant in RSA #604, Oklahoma-9).

[11] Through this waiver request the Mojave Tribe is, in essence, attempting to add an additional public interest eligibility criterion for the wireline frequency block. We find that at a minimum this request is untimely. It should have presented its proposal in the original Rule Making proceeding which created the cellular service. The Commission can establish threshold standards to accept qualified applicants and exclude those applicants who plainly fail to meet the standards. *See e.g.*, Hispanic Information and Telecommunications Network Inc. v. FCC, 856 F.2d 1289 (D.C. Cir. 1989). The Mojave Tribe as an interested party had ample opportunity to participate in the RSA Rule Making proceeding.

[12] Each cellular system licensee can expand its system for five years from authorization, free from competing applications. *See* Rural Cellular Service (Second Report and Order), 2 FCC Rcd 2306 (1987), *modified*, 4 FCC Rcd 5377 (1989).

[13] *See generally*, *Washington v. Confederated Tribes*, 447 U.S. 134 (1980).

[14] Section 22.20(a)(2) provides that an application will be deemed defective and unacceptable for filing if the application does not comply with the Commissions Rules, regulations or specific requests for additional information.

Before the
Federal Communications Commission
Washington, D.C. 20554

In re Application of

INDIAN CELLULAR TELEPHONE COMPANY/NY #4 File No. 10825-CL-P-562-B-89

For facilities in the Domestic Public Cellular Telecommunications Radio Service on Frequency Block B, in Market 562, New York 4 - Yates

MEMORANDUM OPINION AND ORDER

Adopted: November 8, 1991; Released: November 20, 1991

By the Commission:

I. INTRODUCTION

1. In this order, we address a Petition to Deny filed by Trumansburg Home Telephone Company and Port Byron Cellular Inc. (jointly Tru-Port)[1] requesting that the wireline cellular application of Indian Cellular Telephone Company/NY #4 (Indian Cellular) for the New York #4 (Yates) Rural Service Area (RSA) not be granted. For the reasons discussed below, we grant the Tru-Port petition and dismiss Indian Cellular's application.

II. BACKGROUND

2. Indian Cellular is a joint venture owned 51% by the Cayuga Indian Nation.[2] The Cayuga Indian Nation is a federally recognized Indian Tribe with its own tribal government and with which the United States has a government-to-government relationship. However, the Cayuga Indian Nation does not now have a reservation or "currently hold publicly recorded title to lands but they do have a claim to their original reservation," portions of which are within the RSA.[3] Indian Cellular does not have a certificate of public convenience and necessity to provide local exchange telephone service. Indian Cellular won the lottery for this market and was named tentative selectee. Indian Cellular amended its application substituting the application of New York RSA No. 4 Partnership (NY Partnership) pursuant to a partial settlement agreement.[4] NY Partnership was subsequently designated tentative selectee. Indian Cellular maintains that under federal law the tribal government has exclusive jurisdiction, as against state law, to provide or regulate the provision of local telecommunications services within the reservation. According to Indian Cellular, the jurisdictional power reserved to the tribes over reservation lands satisfies the wireline eligibility requirement.[5] Indian Cellular argues that the Commission is obligated to promote tribal access to the telecommunications market so that tribes have the practical opportunity to assert their jurisdiction to provide for their own welfare and promote their economic development.[6] Therefore, Indian Cellular requests that the Commission waive the wireline presence requirement in recognition of the tribes' sovereign right to regulate telecommunications activity in their territories.[7]

3. In its petition to deny, Tru-Port argues that, contrary to the assertions in the waiver request, the Cayuga Indian Nation has neither occupied, governed, or otherwise controlled any reservation lands anywhere near RSA No. 4 for nearly two hundred years. It argues that the only connection with any territory in the area is a lawsuit in which the Cayuga Indian Nation acknowledges that it does not now have a reservation. Indian Cellular is not proposing to provide any cellular service to any portion of the land where the former Cayuga reservation was located, Tru-Port maintains. Moreover, Tru-Port contends, assuming that the Indian Tribe has a right to certificate a company to provide telephone service in the reservation, there is no evidence that Indian Cellular has become certificated, or even applied to the Cayuga Indian Nation for certification. Furthermore, Tru-Port argues that the waiver does not comport with the requirements of Section 22.19 of the rules. In addition, according to Tru-Port, the arguments in support of the waiver are "mooted" by virtue of the partial settlement which reduced the Cayuga Indian Nation's interest in the applicant to a passive minority interest.[8]

4. In opposition, Indian Cellular[9] avers that the Cayuga Indian Nation's right to a reservation in the RSA has been recognized by the Bureau of Indian Affairs and the federal courts. *See Cayuga Indian Nation v. Cuomo*, at n. 5. Moreover, Indian Cellular contends that the Cayuga Indian Nation has retained civil and regulatory jurisdiction over the disputed reservation lands. According to Indian Cellular, the Cayuga Indian Nation has a substantial presence in New York, a smaller presence in the RSA, an established and recognized government and is awaiting the day the reservation boundaries are set so that it can return to its homeland. In addition, it avers that the presence of wireline eligibles in the partial settlement promotes the interests of the set aside requirements and, therefore, is an argument in favor of granting the waiver. Furthermore, the Cayuga Indian Nation will be involved as a general partner in the management of the partnership with the intention of promoting Indian interests. Finally, Indian Cellular claims that the partnership's application proposes service to areas with Cayuga Indian Nation presence and original Indian lands.

III. DISCUSSION

A. Eligibility Requirements

5. An application not in compliance with the rules is defective or unnaceptable for filing. *See* Section 22.20 of the rules. A defective cellular application cannot be amended to cure defects, but must be dismissed pursuant to Section 22.20 of the rules. *See* para. 10, *infra*. Therefore, we must determine whether Indian Cellular's application (the lottery winner) was acceptable for filing, notwithstanding the partial settlement agreement. In settlement cases it is our policy to review the underlying applications in order to prevent abuses to the lottery and the licensing processes. For instance, we have stated upon reviewing settlement agreements that "the *bona fides* of the tentative selectee will be given a hard look prior to grant of the construction permit to assure the Commission that there was no abuse of the cumulative chance

lottery policy." Letter from William Tricarico to Jonathan Blake (May 6, 1986) (FCC 86-237 released May 8, 1986); *Madison Cellular Telephone Co.*, 2 FCC Rcd 837 (Com. Car. Bur. 1987). We have also stated that "the inquiry into the *bona fides* of applicants is limited to the issues of real party in interest and whether cumulative chances were based on independent and acceptable applications." *Madison Cellular*, 2 FCC Rcd at 838.[10]

6. Section 22.902(b), 47 C.F.R. Section 22.902(b), in pertinent part states:

> . . . Common carriers engaged directly or indirectly in the business of affording public landline message telephone service will be assigned frequencies from cellular System B in those areas in which they provide such landline service in some portion of the cellular market . . . .

Wireline common carriers are defined as follows:

> Common carriers which are in the business of providing landline local exchange telephone service...

See 47 C.F.R. Section 22.2.

7. In adopting this separate allocation for wireline carriers, the Commission stated that it was convinced that the separate allocation is the most practical way to make cellular service available to the public in the most expeditious manner possible. The Commission considered that much of the successful research and development in the mobile communications field has come from wireline carriers. Therefore, wireline carriers were in the best position to place cellular systems in operation around the country on a prompt basis. *Cellular Communications Systems*, 86 FCC 2d 469, 488-89 (1981). The Commission decided to consider a wireline applicant eligible to apply only in those markets in which it is certified as a wireline carrier to diminish the need for comparative hearings for wireline frequencies by limiting the number of wirelines that could file in a market. *Id.* at 490 n. 56. *See also Cellular Communications Systems, Reconsideration*, 89 FCC 2d 58, 70 (1982). The Commission also concluded that it considered cellular to be an extension of local exchange service, and expected that wireline carriers would be able to rely on their expertise and knowledge about their individual service areas to make quality cellular service available to their communities in an expeditious manner. *Id.* at 71.

8. When the Commission decided to use lotteries for the selection of mutually competing cellular applications, it maintained the wireline set aside to ensure that rural telephone companies were not precluded from providing cellular service. The Commission stated that it was concerned with the continued financial viability of small telephone companies which is necessary to achieve the Commission's universal service goal. *Cellular Lotteries*, 98 FCC 2d 175, 192-98 (1984). *See also Rules for Rural Cellular Service*, 2 FCC Rcd 3366, 3369 (1987).

9. We do not agree with Indian Cellular that in their case the power of the Cayuga Indian Nation to certify would be a basis for eligibility. We conclude that applicants for wireline cellular frequencies must be in the business of providing landline local exchange telephone service at the time of filing an application in order to be eligible for those frequencies. We cannot determine whether an applicant has a presence in a market if it is not providing landline local exchange telephone service in that market. Although in *Cellular Communications Systems, supra*, the Commission referred to a wireline carrier that is "certified" in the area in which the Block B license is sought, there is no indication that certification is the sole criterion for determining eligibility to apply for a Block B license. *See e.g., Cellular Communications Systems*, 86 FCC 2d at 490; *Cellular Communication Systems Reconsideration*, 89 FCC 2d at 71; *Cellular Lotteries*, 98 FCC 2d at 192-98.

10. Other Commission decisions also support our conclusion that, in order to be eligible, a wireline must be in the business of providing landline local exchange telephone service at the time it files its application. For instance, in *The Offshore Telephone Co*, 65 Rad. Reg. 2d (P&F) 54 (1988), the Commission affirmed the dismissal of Offshore's application because the applicant only provided microwave services in the market and not public landline service as required by Section 22.902(b). In *Montgomery Independent Cellular Telephone Company, Inc*, 4 FCC Rcd 2323 (1989). (*Montgomery*), the Commission affirmed dismissal of a wireline cellular application because the applicant was not a provider of wireline service in the MSA for which it had applied, citing *Advanced Mobile Phone Service Inc. (Los Angeles)*, 93 FCC 2d 683, 685 (1983). *See also, Beehive Cellular Inc.*, 2 FCC Rcd 4505 (Com. Car. Bur. 1987). *Cf., Mobiletel, Inc.*, 5 FCC Rcd 5854 (1990).

11. Indian Cellular is not certified to provide local exchange telephone service in the market, and admits that it was not providing landline local exchange telephone service at the time it filed its application for the New York #4 RSA. Therefore, we must conclude that it was not a wireline carrier within the meaning of the requirements of Section 22.902(b) of the rules at the time it filed its application and, thus, could not apply for the wireline frequencies in the cellular service.[11] Failure to comply with eligibility requirements renders the application defective and subject to dismissal. Such defective applications cannot be amended to correct such defects.[12] *See Montgomery*, 4 FCC Rcd at 2326. *See also, Rem Communications*, 3 FCC Rcd 3705 (1988).

12. Moreover, the plain language of Section 22.33(b)(2) allows partial settlements of wireline applicants only. In enacting the RSA rules, the Commission decided to prohibit nonwireline applicants from entering into partial settlement agreements to discourage the filing of speculative applications. *Amendment of the Commission's Rules for Rural Cellular Service (Third Report and Order)*, 4 FCC Rcd 2440, at 2441 (1988). Wireline carriers, on the other hand, were permitted to continue to enter into settlement agreements because the Commission had no evidence that wireline applicants had filed applications for speculative purposes. The Commission concluded that wireline applicants were likely to be bona fide applicants because they were already operating in the telephone business and, therefore, had good reason to want to participate in cellular. *Id.* at 2442. Therefore, since Indian Cellular was not a wireline carrier, it could not enter into a partial settlement pursuant to this rule.[13] In addition, refusing to process an application submitted pursuant to a partial settlement agreement where the lottery winner is ineligible is necessary to prevent skewing the lottery. To hold otherwise would permit wireline applicants to gain an unfair advantage in the lottery by joining partial settle-

ment groups with one or more ineligible applicants because partially settling applicants are permitted to cumulate their chances in the lottery. *See* Section 22.33(b)(2). Therefore, the Commission does not grant an application filed as a result of a partial settlement unless the tentative selectee's application is grantable. *Madison Cellular*, 2 FCC Rcd at 838.

B. Waiver Request

13. As stated in paragraph 5, *supra*, we must analyze Indian Cellular's application notwithstanding the partial settlement agreement. Requests for waiver will not be granted except upon an affirmative showing:

> (i) that the underlying purpose of the rule will not be served, or would be frustrated, by its application in a particular case, and that grant of the waiver is otherwise in the public interest; or (ii) that the unique facts or circumstances of a particular case render application of the rule inequitable, unduly burdensome or otherwise contrary to the public interest. Applicants must also show the lack of a reasonable alternative.

See 47 C.F.R. Section 22.19.

14. As discussed above, at paras. 6 and 7, the wireline frequency set aside expedites the provision of cellular service to the public while fostering competition by providing for the participation of both large and small telephone companies in the provision of cellular service.[14] A waiver in this case will undermine the policies served by the rule, not further those policies. *See WAIT Radio v. FCC*, 418 F.2d 1153 (D.C. Cir. 1969); *see also*, *WITN, Inc. v FCC*, 849 F.2d 1521, 1525 (D.C. Cir. 1988). Application of the rule in this case promotes our objectives of guaranteeing the participation of wireline companies in the provision of cellular services in this market.[15] Unlike the wireline companies with a presence in the market, Indian Cellular does not have the infrastructure in place nor the demonstrated expertise from previous operations nescessary to initiate service expeditiously, including knowledge about the service area. Moreover, if we granted a waiver in this case we would preclude all the independent and small rural telephone companies, who are in the business of providing landline local exchange telephone service, from having a fair opportunity to provide cellular service in this market. These goals are exactly what the wireline set aside sought to promote. *See Cellular Communications Systems*, 86 FCC 2d 469, 488-89 (1981), *recon.* 89 FCC 2d 58, 70 (1982). Therefore, we conclude that waiver of the rule in this case would not be in the public interest.

15. Moreover, Indian Cellular had in the past, and continues to have, alternatives which do not necessitate a waiver. Indian Cellular could have applied to provide cellular service for the nonwireline block of the cellular frequencies. Indian Cellular may also approach the ultimate licensee[16] for either block of frequencies to establish its own cellular system on the reservation during the five-year fill-in period.[17] Additionally, after the five-year fill-in period expires in this RSA, the Cayuga Indian Nation may apply to provide cellular service in any unserved areas. Therefore, we must conclude that waiver of the rule would be contrary to the public interest.

16. We recognize that federal statutes have fostered tribal self-government and economic development, (25 U.S.C. Section 1, *et seq.*) but we believe that these policies do not, by themselves, justify abrogation of the purpose behind Section 22.902(b) of the rules, which was promulgated pursuant to the Communication Act of 1934.[18]

IV. CONCLUSION

17. We conclude that Indian Cellular was not in the business of providing landline local exchange telephone service in the New York #4 RSA at the time it filed the application and was consequently not qualified to apply for the wireline cellular frequencies. We also conclude that waiver of the eligibility requirements of Section 22.902(b) of the rules is not in the public interest.

V. ORDERING CLAUSES

18. ACCORDINGLY, IT IS ORDERED THAT the application of Indian Cellular Telephone Company/NY #4, File No. 10825-P-562-B-89, and the subsequent amendments ARE DISMISSED.

19. IT IS FURTHER ORDERED THAT the waiver request filed by Indian Cellular is hereby DENIED.

20. IT IS FURTHER ORDERED THAT the petition to deny filed by Trumansburg Home Telephone Company and Port Byron Cellular Inc. IS GRANTED.

FEDERAL COMMUNICATIONS COMMISSION

Donna R. Searcy
Secretary

FOOTNOTES

[1] Trumansburg and Port Byron are two mutually exclusive wireline applicants in the same RSA.

[2] Additionally, the joint venture is owned 23.5% by Henry M. Zachs, 24.5% by Thomas N. Tureen and 1% by Ellen Broden. Indian Cellular avers it is an Indian Tribal enterprise as defined under the Indian Financing Act of 1974, Pub. L. 93-262, 25 USC Section 1451, *et seq.*, inasuch as it is an Indian-owned commercial, industrial, agricultural or business activity established or organized for the purpose of profit.

[3] The Cayuga Indian Nation filed a suit in federal court against the State of New York seeking declaration of their current ownership and right to possess certain land. On motion for partial summary judgment, the court held that the Cayuga Indian Nation's 1795 and 1807 conveyances of property to the state of New York were invalid under the Nonintercourse Act, absent evidence that the conveyances were ever expressly ratified by federal treaty. *See* Cayuga Indian Nation of New York v. Cuomo, 730 F. Supp. 485 (N.D.N.Y.1990)(Cayuga III). Recently, the Court held that abandonment is not a defense to the Cayuga suit, and that the Cayuga Indian Nation can maintain their suit notwithstanding the fact that they no longer live on the land in question. Cayuga Indian Nation of New York v. Cuomo, No. 80-CV-930, No. 80-CV-960 (N.D.N.Y. March 6, 1991). In addition, the Court previously overruled time-based defenses and determined that the Cayuga Indian Nation is a recognized tribal entity, that the lands at issue are covered by the Nonintercourse

Act as tribal lands and that the trust relationship between the United States and the Cayuga Indian Nation has never been terminated. *See also* Cayuga Indian Nation of New York v. Cuomo, 667 F. Supp 938 (N.D.N.Y. 1987)(Cayuga II); Cayuga Indian Nation of New York v. Cuomo, 565 F.Supp. 1297 (N.D.N.Y.1983)(Cayuga I). Opposition of NY Partnership and Indian Cellular to Petition to Deny filed by Tru-Port, Attachment A, July 19, 1990.

[4] Indian Cellular has a 16.66% ownership interest and is not a managing partner in NY Partnership, which is comprised of clearly eligible wireline carriers.

[5] Indian Cellular claims that the Cayuga Indian Nation has the power to certify Indian Cellular within the reservation and this power alone could be a basis for wireline eligibility. Indian Cellular also argues that any Indian tribe, including the Cayuga's, is in fact indirectly providing landline telephone service to the reservations through the forbearance of the exercise of their jurisdictional powers over wirelines currently operating on tribal lands.

[6] Indian Cellular argues that the tribe should be treated as a rural wireline company so that it not be excluded from providing basic telephone service to remote areas using cellular or other technologies, to promote the goal of universal service.

[7] Indian Cellular claims that tribal eligibility is peculiar to those markets which have tribal lands, so that it made little sense to participate in the cellular Rule Making proceeding and is pursuing this waiver request instead.

[8] Tru-Port argues that unless the Indian Cellular application could have been granted, the amended application substituting NY Partnership as the applicant must be denied. Otherwise, unqualified applicants could file applications, seek waiver of qualification requirements, and settle with one or more qualified applicants.

[9] The opposition to the petition to deny was filed by NY Partnership. We refer to it as the Indian Cellular opposition.

[10] Likewise, we will also look at settlement agreements to determine whether they comport with our rules. *See* Advanced Mobile Phone Services, Inc., 93 FCC 2d 683 (1983). *Compare* Ellis Thompson, 64 RR 2d 1709 (Mob. Ser. Div. 1988) (disqualification of some members of a cellular settlement partnership does not automatically preclude other members from qualification).

[11] We find Indian Cellular's forberance argument untenable, note 7, *supra*. Forbearing from exercising jurisdictional powers over wirelines providing service on Indian reservations does not amount to the provision of service by the Indian tribes. Therefore, we find that this does not amount to an indirect provision of landline telephone service by Indian tribes.

[12] Section 22.20(a)(2) provides that an application will be deemed defective and unacceptable for filing if the application does not comply with the Commission's rules or specific requests for additional information.

[13] We do not intend to imply that Indian Cellular had a speculative purpose in filing its application. In fashioning the general prohibition against nonwireline applicants joining partial settlement agreements, the Commission sought to avoid making a case-by-case factual determination about an individual's motivations for filing an application.

[14] Through this waiver request Indian Cellular is, in essence, attempting to add an additional public interest eligibility criterion for the wireline frequency block. We find that at a minimum this request is untimely. It should have presented its proposal in the original Rule Making proceeding which created the cellular service. The Commission can establish threshold standards to accept qualified applicants and exclude those applicants who plainly fail to meet the standards. *See e.g.*, Hispanic Information and Telecommunications Network Inc. v. FCC, 856 F.2d 1289 (D.C. Cir. 1989). The Cayuga Indian Nation as an interested party had ample opportunity to participate in the RSA Rule Making proceeding.

[15] In addition, we do not find that a waiver has been justified simply because Indian Cellular would become a minority partner of the ultimate licensee, which would be controlled by eligible wireline carriers. As stated previously, permitting a nonwireline carrier to enter a partial settlement agreement would encourage the filing of speculative applications and permit the lottery to be skewed, the very dangers the Commission sought to avoid in fashioning its partial settlment prohibition for nonwireline applicants. We will not now engage in the fact specific inquiry to determine Indian Cellular's bona fides that the Commission originally sought to prevent in fashioning the general rule. In addition, Indian Cellular has not provided any nondiscriminatory test which would make its situation distinguishable from any other nonwireline applicant that sought to file for a wireline frequency. *See Northeast Cellular Telephone Co. v. FCC*, 897 F.2d 1164 (D.C.Cir. 1990).

[16] In the past we have ruled that ineligible applicants may have minority interests in eligible partnerships at the application stage. *See* Advanced Mobile Service Inc., 93 FCC 2d 683, 692 (1983) (Los Angeles Order).

[17] Each cellular system licensee can expand its system for five years from authorization, free from competing applications. *See* Rural Cellular Service (Second Report and Order), 2 FCC Rcd 2306 (1987), *modified*, 4 FCC Rcd 5377 (1989).

[18] *See generally, Washington v. Confederated Tribes*, 447 U.S. 134 (1980).

Before the
Federal Communications Commission
Washington, D.C. 20554

CC Docket No. 90-257

In re Applications of

LA STAR CELLULAR TELEPHONE COMPANY — File No. 27161-CL-P-83

For a construction permit for facilities operating on Block B in the Domestic Public Cellular Radio Telecommunications Service in the New Orleans, Louisiana, MSA

and

NEW ORLEANS CGSA, INC. — File No. 29010-CL-P-83
File No. 29181-CL-P-85

To amend its construction permit for facilities operating on Block B in the Domestic Public Cellular Radio Telecommunications Service, Call Sign KNK224, in the New Orleans Louisiana, MSA

Appearances

Gary S. Smithwick, *Arthur V. Belendiuk*, and *Lisa Thornton*, on behalf of La Star Cellular Telephone Company; *L. Andrew Tollin*, *Luisa L. Lancetti*, *Marcy A. Bass*, and *Martin T. Walsh*, on behalf of New Orleans CGSA, Inc.; *Herbert D. Miller, Jr.*, on behalf of United States Cellular Corp.; and *R. Barthen Gorman*, on behalf of the Chief Common Carrier Bureau.

INITIAL DECISION OF ADMINISTRATIVE LAW JUDGE JOSEPH CHACHKIN

Issued: November 8, 1991; Released: November 25, 1991

PRELIMINARY STATEMENT

1. This proceeding concerns the competing applications of La Star Cellular Telephone Company (La Star) and New Orleans CGSA, Inc. (NOCGSA). La Star is a joint venture comprised of SJI Cellular, Inc. (SJI) and Star Communications Co. (Star). Star owns a 49% minority interest in La Star and SJI owns the 51% majority interest. All of the stock of Star is owned by United States Cellular Corporation (USCC), which in turn is a subsidiary of Telephone and Data Systems, Inc. (TDS). La Star and NOCGSA seek the right to operate as the wireless carrier offering cellular telephone service to St. Tammany Parrish, which is part of the New Orleans MSA.

2. The Hearing Designation Order, 5 FCC Rcd 3286, released May 31, 1990 details the background facts which gave rise to the instant hearing. Briefly recited, NOCGSA currently holds a license to operate a cellular system on frequency Block B in the New Orleans MSA. However, NOCGSA's authorization granted in July 1983 permits coverage only of that portion of the MSA containing the city of New Orleans. On August 17, 1983, NOCGSA applied to expand its geographical service area to include parts of St. Tammany Parish. In September, 1983, La Star filed a competing application to provide cellular service to St. Tammany Parish.

3. The Commission rejected La Star's application as untimely and granted NOCGSA's application. On appeal, the U.S. Court of Appeals for the District of Columbia Circuit reversed the Commission's action and ordered reinstatement of La Star's application. The Commission then reinstated La Star's application and rescinded NOCGSA's authorization to serve St. Tammany Parish. However, NOCGSA has been given authority to continue operating in St. Tammany Parish on an interim basis.[1]

4. The Hearing Designation Order contains threshold and comparative issues. The threshold issues, which will be addressed first, stems from the Commission's requirement that applicants for Block B licenses have a wireline presence in the MSA for which they are applying. SJI, the majority owner of La Star has the requisite wireline presence; however, Star, the minority owner, USCC, and its parent TDS, do not. The threshold issues were designated to determine if SJI maintains control over La Star. If not, La Star's application is subject to dismissal. Hearing Designation Order, 5 FCC Rcd at 3289. The threshold issues are as follows:

(1) To determine whether SJI maintains control over the decisions of La Star in connection with the prosecution of the captioned application;

(2) To determine whether SJI maintains control over its proposed cellular system;

(3) To determine whether Star is in *de factor* control of La Star;

(4) To determine, in light of the evidence adduced under the foregoing issues, whether La Star is eligible to apply for Block B frequencies.

La Star has the burden of proceeding with the introduction of evidence and the burden of proof on the threshold issues. USCC was made a party to the proceeding solely with respect to the threshold control issues.[2]

5. The contingent comparative issues are as follows:[3]

(1) To determine whether NOCGSA's expansion applications will better serve the public interest because of any close connection between St. Tammany Parish and other parts of the New Orleans MSA;[4]

(2) To determine on a comparative basis the geographic area and population that each applicant proposes to serve; to determine and compare the relative demand for the services proposed in said areas; and to determine and compare the ability of each applicant's cellular system to accommodate the anticipated demand for both local and roamer services;

(3) To determine on a comparative basis the nature and extent of the service proposed by each applicant, including each applicant's proposed rates, charges, maintenance, personnel, practices, classifications, regulations, and facilities (including switching capabilities);[5]

(4) To determine on a comparative basis each applicant's proposal for expanding its system capacity in a coordinated manner within its proposed Cellular Geographic Service Area (CGSA) in order to meet anticipated increasing demand for local and roamer service;[6] and

(5) To determine whether NOCGSA should be given a comparative credit for operational efficiencies which may exist if there is a demonstrated community of interest between New Orleans and St. Tammany Parish;

(6) To determine, in light of the evidence adduced under the foregoing issues, what disposition of the referenced applications would best serve the public interest, convenience, and necessity.

FINDINGS OF FACT
THRESHOLD ISSUES
BACKGROUND

6. La Star Cellular Telephone Co. (La Star) is a joint venture consisting of SJI Cellular, Inc. (SJI), the 51 percent owner, and Star Cellular Telephone Co. (Star), the 49 percent owner. SJI Cellular, Inc. is a wholly-owned subsidiary of SJI, Inc. which, in turn, is the parent of Lafourche Telephone Company (Lafourche). La Star's elibility for the New Orleans MSA wireline cellular license is premised solely on SJI Inc.'s ownership of Lafourche.

7. Section 22.902(b) of the Commission's rules limits wireline eligibility (Block B) in the cellular telephone service to entities affiliated with carriers "engaged directly or indirectly in the business of affording public landline message telephone service in those areas in which they provide such landline service in some portion of the cellular market . . . "

8. From September 1983-July 1987, the La Star joint venture partners were SJI, Star Telephone Company of Baton Rouge, La. and Maxcell Telecom Plus (Maxcell). From August 1987 through the present, the 49 percent minority partner, Star Cellular, has been owned by United States Cellular Corporation (USCC), a subsidiary of Telephone and Data Systems, Inc. (TDS). The same Joint Venture Agreement has governed La Star's affairs from September 1983 to May 31, 1990 -- the *HDO* release date.[7] The Joint Venture Agreement calls for creation of a Management Committee to run La Star's affairs. During the years of Maxcell's involvement in the venture, the Committee consisted of the following individuals:

John A. Brady, Jr. - Chairman (SJI representative)

James P. Brady - Vice Chairman (SJI representative)

Tanya B. Ditto - Member (SJI representative)

Alvin E. Kimble - Secretary/Treasurer (Star-Star Telephone representative)

William W. Erdman - Member (Star-Maxcell representative)

9. During the years of USCC's involvement in this venture (from August 1987 to present), the Management Committee has consisted of:

John A. Brady, Jr. - Chairman (SJI)

James P. Brady - Vice President (SJI)

Sinclair Crenshaw - House Counsel (SJI)

H. Donald Nelson - Member (USCC)

Kenneth Meyers - Secretary/Treasurer (USCC)

La Star Joint Venture - September 1983 - July 1987

10. On June 7, 1982, NOCGSA's predecessor, a wholly-owned AT&T subsidiary (American Mobile Phone Service, Inc. "AMPS"), filed the only wireline application for the market designated as the New Orleans MSA. At the time, the New Orleans MSA included Orleans Parish (the city of New Orleans); Jefferson Parish (the adjacent parish immediately to the west of Orleans); St. Bernard (the adjacent parish immediately to the east of Orleans); and St. Tammany Parish (the parish directly across Lake Pontchartrain from Orleans Parish). AMPS' eligibility was based on its affiliation with South Central Bell Telephone Company, which provides landline local exchange service to the City of New Orleans and other parishes within the New Orleans MSA. AMPS' application for the MSA was granted on July 11, 1983.[8]

11. As stated, *supra*, SJI, Inc., located in Larose, Louisiana -- 50 miles south of New Orleans -- is a holding company which owns Lafourche Telephone Company. Lafourche, SJI, Inc. and SJI Cellular are operated out of the same offices. The President of SJI, Inc. was and is John A. Brady, Jr. His brother, James P. Brady, was and is Vice President and Chairman of the Board of SJI, Inc. SJI, Inc. presently "is a $40 million corporation." Tr. 1157. James was and is President and a director of Lafourche and John was and is Vice President and Chairman of the Board of Lafourche. Lafourche's revenues in 1990 were $14-15 million. Tr. 818.

12. Because Lafourche provided telephone service to a small portion of the New Orleans MSA, SJI was eligible in 1982 to apply for the New Orleans MSA market when the authorization became available. Tr. 831, 860, 1081. However, SJI decided not to apply for the New Orleans MSA and it let the filing window pass because of the expense involved in preparing and prosecuting an application. Tr. 860.

13. On August 1, 1983, shortly after the Commission's grant of its New Orleans MSA construction permit, AMPS filed its first cellular geographic service area (CGSA) expansion application, proposing two cells which would serve the southern half of St. Tammany Parish -- a largely residential area within the New Orleans MSA directly across Lake Pontchartrain. AMPS' expansion application was filed "for the purpose of providing service to the communities, and surrounding areas, of Covington, Mandeville, and Slidell, Louisiana -- the largest communities in St. Tammany Parish." NOCGSA Dir. Ex. 4 at 3.

14. Thereafter, on September 16, 1983, La Star filed a mutually exclusive application proposing six cells, all located in St. Tammany Parish and covering most of the Parish area. La Star identified itself as a joint venture whose "principal place of business . . . is 112 West 10th Street, Larose, Louisiana, 70373, which also serves as the

principal place of business of Lafourche and of SJI Cellular, Inc., La Star's majority owner." La Star 1983 Application at Ex. L-2 at 2.

15. Wireline eligibility for the La Star application was premised on the fact that SJI, Inc. also owned Lafourche. In 1983, the 49 percent non-eligible party was Star Cellular Telephone Co. (Star) which, in turn, was owned by Star Telephone Company, Inc., (Star Telephone) and Maxcell Telecom Plus (Maxcell). Star Telephone provided service within the Baton Rouge MSA. Maxcell was in the business of preparing cellular applications and was pursuing interests in other wireless and non-wireline cellular applications and permits. La Star Ex. 12 at 2; NOCGSA Reb. Ex. 12, Ex. L-2 at 5; Tr. 2135.

16. Some six months prior to the La Star application filing, in March 1983, an application for the wireless authorization in Baton Rouge was filed by Star Cellular Telephone Company. Tr. 916, 928; NOCGSA Reb. Ex. 12. SJI was completely uninvolved in the Baton Rouge venture. Tr. 918.

17. Wireline eligibility for the Baton Rouge market was based on the 51 percent interest in the joint venture held by Star Cellular Communications, Inc., a wholly-owned subsidiary of Star Telephone Company, Inc. (Star Telephone), which provided landline service to subscribers in the Baton Rouge SMSA. NOCGSA Reb. Ex. 12, Ex. L-2. Star Telephone was, in turn, a wholly-owned subsidiary of Cail Enterprises, Inc., whose sole shareholder, officer and director was Alvin E. Kimble. The officers and directors of Star Cellular included Kimble, President, Director and I. V. Jeansonne, Director. Jeansonne was also the President and General Manager of Certified Engineering, Inc., a telephone engineering firm which provided engineering services to Star Telephone. NOCGSA Reb. Ex. 12.

18. The 49 percent ineligible minority venture partner in the joint venture was Cellular Systems Investments, Inc. (CSII) located at 1730 Pennsylvania Avenue, N.W., Washington, D.C. CSII was a wholly-owned subsidiary of Maxcell, which was located at the same Pennsylvania Avenue address in Washington. NOCGSA Reb. Ex. 12. William Erdman and Max Hugel were identified as the two largest individual stockholders in Maxcell. NOCGSA Reb. Ex. 12, Ex. L-2 at 3.

19. The Baton Rouge application also identified other wireline market applications in which CSII held a minority interest in joint ventures. In addition, it indicated that Maxcell would be filing in a number of non-wireline markets, where the wireline eligibility criteria were inapplicable, as the controlling party. Star Telephone identified no other cellular interests. NOCGSA Reb. Ex. 12, Ex. L-2 at 5.

20. Shortly after the March, 1983 Baton Rouge cellular application filing with the FCC, Kimble -- President of Star Telephone -- was in contact with John Brady. He told Brady that William Erdman (of Maxcell) had a proposal involving New Orleans. Tr. 949. As stated above, SJI had not originally filed an application for the New Orleans MSA because of the expense involved in preparing and prosecuting the application through the comparative hearing process. In their conversation, Kimble told Brady that he was "happy with" his Baton Rouge joint venture arrangement with Erdman (and Maxcell) and "suggested that their partnership become involved with [SJI] in filing the St. Tammany cell sites." Tr. 951.

21. Kimble told Brady that Erdman "had a proposal to put forward for Star Cellular and asked if [Brady would] listen to it." Brady knew "very little" about Erdman but Kimble told him that Maxcell and Star "appeared to be successfully negotiating an agreement with . . . BellSouth Mobility, at the time" and that Kimble "felt sure the Baton Rouge application would end up in successful negotiation with BellSouth Mobility." Tr. 951-952.

22. BellSouth Mobility Inc. (BMI) had also applied for the Baton Rouge MSA wireline cellular authorization, again based on its affiliation with South Central Bell - the major landline provider in the MSA. Through a process of settlements, BMI became the managing partner and a major interest holder in the Baton Rouge wireline system. USCC Ex. 1 at 2, note 30.

23. Brady testified that Star's proposal regarding St. Tammany was as follows:

> Maxcell, one of Star Cellular Telephone Company's (Star) original venturers, had experience preparing cellular applications and therefore, Star offered to pay for the filing and prosecution of the applications in return for a 49 percent interest in the application . . . . In return for receiving a 49 percent interest in an application it would otherwise not be authorized to file, Star agreed to bear the cost of preparing and prosecuting the application. La Star Ex. 12 at 2.

Brady was interested in what he heard and, subsequently, Erdman had the proposed La Star Joint Venture Agreement prepared and delivered to Brady's office. Tr. 1091.

24. The La Star Agreement set up a 51 percent/49 percent ownership structure with SJI, the wireline eligible party holding the majority interest. The Agreement created a five member Management Committee with a 3-2 voting scheme to direct the Company's affairs. In addition, under the Agreement, all expenses of filing and prosecuting the La Star application were to be borne by the minority partner and were to be reimbursed out of system revenues of "external financings . . . available for distribution." Further, the Agreement expressly provided that SJI, the majority partner was to bear "no financial exposure" for the venture until such time, if any, as the construction permit was granted. La Star Ex. 12, Attachment B.

25. The Agreement also subjected many of the enterprise's activities to supermajority voting and minority partner negative control. Article IV, Section 4.2 requires that any decision with respect to appointment, compensation, or termination of the system's general manager or management entity requires the vote of 80% of the members of the Management Committee. Section 4.3 of the same Article lists 13 actions requiring a vote of 80% of the Management Committee including decisions whether to accept any settlement or withdraw any litigation, application or pleading before any local, state or federal court or agency.

26. Brady asked his local attorney in Larose, Louisiana, J. J. Erny, to review the La Star Joint Venture Agreement. His counsel had no FCC experience but was critical of the contract. Tr. 1091. Brady testified that Erny disapproved of the breadth of the supermajority provisions and their impact on SJI's ability to control the entity:

> We specifically took every one of the supermajority provisions, which Mr. Erny's recommendation to us was on those to find out if you can modify them, find out if you're capable of changing them up, see if you can move them into other categories, because his view was that the fewer of those we had or the less restrictive we have, the easier it would be to operate the company in the future. Tr. 1092.

Given SJI's unfamiliarity with its minority partner and the Agreement's grant of such extensive powers to the minority partner, Erny also told Brady that he should have an "escape clause" added to the contract, warning:

> If you're in bed with an alligator, make sure you have easy arrangements to get out of bed from the alligator . . . . Tr. 1093.

27. Concerned about Erny's observations, John and James Brady flew to Washington the next day to meet with Erdman in a hotel room. Tr. 864-865, 1091. The supermajority provisions were discussed "on and off all day" but the Bradys "were not able to move Mr. Erdman off of them one way or the other" and none of the supermajority provisions were changed. Tr. 1092.

28. As a result of Erny's concern that SJI might need to bail out of the venture at a moment's notice, Erdman did agree to include an "escape clause" allowing SJI to force Star to buy it out on demand (or vice versa). Tr. 1105; *See* La Star Ex. 12 at Article 4.3. This provision was also drafted by counsel for the minority partner. Brady indicated that Erdman had a buyout provision in some undisclosed "other document that he had sent us . . . ." Tr. 1093. The clause had been written by Erdman's attorney, William Franklin, who also became counsel to the La Star Joint Venture. J. J. Erny merely approved it in "telephone conversations." Tr. 1093. Thus, Article IX was added to the contract. A related change was also made in the La Star Agreement concerning how the third appraiser (in a buyout situation) would be chosen. Tr. 1093, 1082. Finally, Brady testified that Erdman agreed to a proposed change in the Agreement's governing law to Louisiana -- a change suggested by Mr Erny. Tr. 1092.

29. With the Joint Venture Agreement virtually identical in its terms to the terms of the earlier draft Agreement presented by Erdman, John Brady signed for SJI and William Erdman (of Maxcell) signed for Star. La Star 1983 Opposition, Ex. L-2, Agreement at 26.

30. As mentioned, some six months prior to the La Star application filing, Star Cellular Telephone Company (owned by Star Telephone and CSII, a wholly owned subsidiary of Maxcell) filed an application for the Baton Rouge wireline authorization. Again, the application included a Joint Venture Agreement between the wireline eligible partner, Star Telephone, and the minority partner, CSII/Maxcell. NOCGSA Reb. Ex. 12.

31. The Baton Rouge Agreement was entered into on March 3, 1983 and signed by Alvin Kimble as President of Star Cellular and William Erdman as President of CSII. The Baton Rouge Agreement also created a five-person Management Committee to run the applicant's affairs. The Committee was composed of three representatives appointed by Star Cellular and two appointed by CSII/Maxcell. The application reflected that the Committee was composed of the following members:

Alvin E. Kimble, C.P.A., Chairman (Star)

I. V. Jeansonne, P.E., Member (Star)

David A. Irwin, Esq. Secretary (Star)

William Erdman, Member (CSII)

Max Hugel, Member (SCII)

NOCGSA Reb. Ex. 12.

32. A review of the Baton Rouge Agreement shows that aside from the absence of a buyout provision, the basic terms are virtually identical to the later-executed La Star Agreement. Among other similarities, the Baton Rouge Agreement contains the same 51/49 percent ownership structure, with the minority party bearing all of the expenses of preparing and prosecuting the application, and the majority eligible party bearing no "financial exposure" until such time, if any, as the construction permit is awarded. NOCGSA Reb. Ex. 12.

33. Maxcell's engineers, counsel, and other agents prepared La Star's original 1983 application. Tr. 848-849, 863-864, 873. Having used William Franklin for other Maxcell FCC application work (*e.g.*, Baton Rouge), Erdman hired him for the La Star project. Tr. 871. When Franklin was hired to work on La Star, Brady did not know him; he never did meet him personally. Tr. 845-846, 860, 868, 870-871. However, Brady was aware that Franklin was Maxcell's counsel. Tr. 847-848.

34. Franklin, in turn, and without Brady's knowledge, hired Dr. Andy Anderson and Dr. James Wright to prepare the demand and demographic portions of the La Star application. Tr. 910. Dr. Anderson worked on the demographic and demand exhibits for "hundreds" of Maxcell applications. Tr. 2135. Although Dr. Anderson also prepared portions of La Star's 1983 application, 1987 amendment, and direct, rebuttal, and surrebuttal case exhibits, Brady was unfamiliar with Dr. Anderson. Tr. 908-909.

35. Brady indicated that Messrs. Erdman and Franklin had unlimited authority in preparing the La Star application and in hiring engineers, statistical experts, and any other consultants. Brady merely instructed: "let's have a good application." Tr. 910. In fact, Brady ultimately testified that Maxcell "was in charge of preparing the application . . . ." Tr. 863.

36. No SJI personnel worked on the application. Tr. 863. Brady never met the Maxcell engineer who prepared and signed the engineering and FAA certifications for the application -- Nadia Adawi. Tr. 885, 881-882, 1124. Brady did not know that La Star's application had been prepared at the address appearing below Nadia Adawi's name for each of the cell sites in the application. Tr. 865, 881-882. At hearing Brady was unable to identify the address on the La Star application, even though the application itself identifies the address as Maxcell's headquarters. Tr. 882.

37. I. V. Jeansonne, a Star Telephone Management Committee member and director in the Baton Rouge venture, signed the La Star cell site agreements. La Star 1983 Application at Ex. L-1. Brady was unaware of the fact that Maxey Resweber, a local real estate agent for Century 21, was working for La Star on obtaining the necessary sites for the engineering portion of the application. Tr. 1042. No one at SJI was working with her or was being coordinated with, despite the proximity of Larose to St. Tammany.

38. La Star's Schedule of Proposed Charges (Ex. L-3) proposed cost-based rates. The rate design for the Schedule of Proposed Charges was prepared by Cornell, Pelcovits & Brenner Economists. La Star's System Management Exhibit (Ex. L-7) proposed Management Committee direction and ultimate responsibility for the day-to-day operations of the proposed cellular system.

39. With regard to the La Star financial commitment, the American Security Bank was used. Erdman (of Maxcell) was involved in obtaining the loan commitment. Tr. 877-878. The bank was physically close to Maxcell headquarters -- in Washington, D.C. -- and had never been used by John Brady or SJI for any other venture. Tr. 876. Brady did not know anyone at the bank and never personally met with anyone from the bank. Brady did receive one call from a bank officer who called at the behest of Erdman. Brady testified that he believed the only purpose of the call was "to find out if I was a real person." Tr. 877.

40. SJI's claimed contribution to the application (other than providing ownership information about itself) was John Brady's idea that the proposed system should consist of six cells. According to Brady, the six-cell system design was at his "insistence." This idea was not based on Dr. Anderson's demand work for the application or any other demographic study SJI independently commissioned. Nor was it based on Brady's cellular telephone experience, because in 1983 he had no such experience. La Star Ex. 12 at 2, 3, 12; Tr. 877, 886, 892-893.

41. Brady, however, was unclear of the basis for his six-cell idea. He indicated initially and without qualification at hearing that the six-cell design was based on the location of population centers. Tr. 886. At hearing, Brady stated:

> Mr. Brady: Okay, the answer is, I made a study of the population. I made a study of where the towns were located, where the population was located, whether that study would be qualifying enough to go into the FCC's license for what you call a demographic study might be questionable, but, yes, I studied the area, I studied the population, and came up with a six-cell configuration. Tr. 886.

Shortly thereafter, he was asked whether he was aware that the La Star application anticipated some 50 subscribers each for two of its proposed six cells and he indicated:

> Mr. Brady: No I am not aware of that fact.
>
> Mr. Tollin: You are not aware of that. Well, that is in your application.
>
> Mr. Belendiuk: Then why is he asking this?
>
> Mr. Tollin: How many times can I explain why I am asking this?
>
> Judge Chachkin: Just go ahead with your questions.
>
> Mr. Tollin: Isn't it true there are three major towns in St. Tammany Parish?
>
> Mr. Brady: In 1983, yes, that would be true.
>
> Mr. Tollin: And what are those three towns?
>
> Mr. Brady: I would have to look at the -- there are three major areas, I would have to look at the map to pick our specific areas. Tr. 888.

Brady then testified that his six-cell design was not based on the population centers:

> Mr. Tollin: Isn't it true that the three [major] areas are Slidell, Mandeville, and Covington?
>
> Mr. Brady: Yes
>
> Mr. Tollin: Isn't it true that your six-cell design covers well beyond those three areas?
>
> Mr. Brady: The six-cell design is designed for total coverage.
>
> Mr. Tollin: Of the geographic area?
>
> Mr. Brady: Of the geographic area, yes.
>
> Mr. Tollin: So it is not designed with population in mind?
>
> Mr. Brady: That is correct. May I explain on that last answer?
>
> Mr. Tollin: Sure
>
> Mr. Brady: It is designed not only for geographic coverage, it is designed for population coverage. Tr. 888-889.

A review of the application shows that the six cells cover virtually the entire Parish and are not just centered around the three major population centers. (The three centers are all located in the southern half of the Parish towards Lake Pontchartrain and New Orleans.)

42. As with the Joint Venture Agreement, the contents of the earlier-filed Baton Rouge application are materially similar to the La Star application. First, the Baton Rouge counsel for Star was William Franklin (who also represented La Star six months later). FCC Form 401s were included for the five proposed cells, which covered most of the Baton Rouge MSA. On each certification page, the person responsible for preparing the engineering information was: Nadia Adawi, 1730 Pennsylvania Avenue, N.W., Suite 1125, Washington, D.C. NOCGSA Reb. Ex. 12, Forms 401. Ms. Adawi also signed the attached FAA notification forms. Again, Ms. Adawi also prepared the La Star engineering exhibit.

43. The Baton Rouge Schedule of Proposed Charges Exhibit (L-3, as in the La Star application) proposed cost-based rates. The rate design underlying the schedule was prepared by the economic consulting firm of Cornell, Pelcovits & Brenner Economists, Inc. (again like La Star). NOCGSA Reb. Ex. 12, Form 401 at Ex. L-3. The System Management Exhibit (L-7) proposed Management Committee direction and ultimate responsibility for the day-to-day operations of the proposed cellular system and again mirrowed identical language in the La Star Agreement. The Financial Qualifications Exhibit (L-4) contained a loan proposal to CSII of $10 million from the American Security Bank in Washington and a loan from Maxcell to the Joint Venture. The American Security loan was actually addressed to Erdman, as President of CSII. NOCGSA Reb. Ex. 12, Form 401 at L-4. Again, this bank also provided the La Star financial commitment. Exhibit L-8 (p.2) also contained a "Demographic and Public Need Analysis" prepared by Drs. Andy Anderson and James Wright of New England Research Associates. Once again, Drs. Anderson and Wright prepared the analogous exhibit for the La Star application.

44. On October 1, 1984, the Common Carrier Bureau dismissed the La Star application and granted NOCGSA's expansion application. Following the dismissal of the La Star application, La Star changed legal counsel. Again, Maxcell and specifically, Kent Nakamura, its general counsel, hired La Star's new attorney, Arthur Belendiuk. Tr. 1120, 995. Brady had not met or worked with Belendiuk at the time of his hire; moreover, he barely was familiar with Nakamura. Tr. 1120-1121. Brady was unaware that Nakamura was general counsel of Maxcell. Also, that Nakamura signed pleadings on behalf of La Star as general counsel of Maxcell. Tr. 1120-1122. In this regard, La Star filed a Request for Stay of the Dismissal with the Commission. The signature page identifies La Star's attorneys as Kent Y. Nakamura, who simultaneously identifies himself as General Counsel of Maxcell, and Arthur V. Belendiuk of Cate & Goodbread. The Maxcell attorney is listed first on the pleading.

45. On the same day, October 31, 1984, La Star also filed an Application for Review of the dismissal Order with the U.S. Court of Appeals for the District of Columbia Circuit. Again, La Star was represented by Kent Nakamura and Arthur Belendiuk. Belendiuk began showing up alone on La Star pleadings commencing on February 19, 1985, in a Motion filed with the Commission for expedited action of its earlier filed stay.

46. On May 6, 1985, the Commission denied the La Star Stay and Application for Review. Thereafter, on June 5, 1985, Belendiuk, as counsel for La Star, filed an appeal of the La Star order with the United States Court of Appeals for the District of Columbia Circuit. During the same period, Belendiuk also filed petitions for review of other Commission actions -- as counsel of record for Maxcell.[9]

47. Belendiuk hired Richard Biby as the outside consulting engineer for La Star. Tr. 993. Brady (of SJI, the majority La Star partner) had never met or worked with Biby when Belendiuk hired him. Tr. 101. Belendiuk also retained Drs. Anderson and Wright, the demand/demographic experts first hired by Maxcell, to work on La Star matters. Ms. Resweber, the Century 21 real estate agent, again originally hired by Maxcell, also continued to work on La Star site matters.

48. In 1986, while the La Star dismissal order was working its way through the Court of Appeals, SJI, Inc., through its wholly-owned subsidiary, MobileTel, Inc., filed a cellular application for the Houma-Thibodaux MSA in Louisiana. SJI used the law firm of Mintz, Levin, Cohn, Ferris, Glovsky & Popeo, P.C. as FCC counsel for the filing. (Howard Symons of that law firm is still SJI's FCC counsel). Tr. 900-901. Biby (La Star's consulting engineer) was not used for the engineering portions of the application. Tr 962-963. Dr. Anderson (La Star's demand expert) was not used as the expert for the demand exhibit of the application. Ms. Resweber (the local realtor who worked for La Star) was not used for cell site matters. A Jackson, Mississippi bank was used for the financial commitment (not the American Security Bank used by La Star). Tr. 902.

La Star Joint Venture - August 1987 - Present

49. Following the April 7, 1987 Court of Appeals' ruling, Star looked for a buyer of its 49 percent interest in La Star. Under the terms of the Joint Venture Agreement, SJI was offered the option to purchase Star's interest during this period. The offer did not involve absorption of the Star debt incurred to date, and Brady recognized the price would be far lower than if La Star had the St. Tammany permit in hand. Tr. 963-966, 1113-1114. Despite SJI's interest in Houma/Thibodaux and Brady's testimony that SJI developed a "plan" in 1983 "to acquire as much cellular property as possible," SJI chose not to purchase Star's 49 percent interest. Tr. 836, 964, 1114.

50. Ultimately, on July 31, 1987, United States Cellular Corporation (USCC), a subsidiary of Telephone and Data Systems, Inc. (TDS), purchased the stock of Star for $327,000. USCC Ex. 1 at 10. Nelson, President of USCC, believed that the La Star Joint Venture Agreement was favorable to the minority party, USCC, and the previously governing Joint Venture Agreement was not changed in any way. Tr. 1396. SJI did not meet with USCC personnel until after USCC had bought out Star's interest in the La Star Joint Venture. Tr. 977; La Star Ex. 12 at 7.

51. USCC and its parent, TDS, are publicly traded companies. By 1989, USCC had 408 employees; at the end of 1990, USCC had 665 employees. USCC presently owns, operates or invests in cellular systems in 100 metropolitan and rural areas. Cellular systems in which USCC has an interest are operational in 88 such areas. Since 1983, USCC has put 45 new systems on the air. USCC Ex. 1 at 1, 7. USCC manages 45 systems, including "eight of the systems in which it has minority interests, and five other systems in which it has no equity interest." USCC Ex. 1 at 2 (footnote omitted). USCC owns a 49 percent interest in a number of cellular markets it manages. USCC Ex. at Table 1. USCC's stated primary business purpose is:

> to construct cellular systems for itself and for others, to provide management services for itself and for others, and to monitor the construction and operation of those cellular systems in which it has an investment interest but which it has not been engaged to construct or manage. USCC Ex. 1 at 7.

52. USCC has been "historically active in seeking to increase its cellular holdings throughout the country and would most likely consider any offer by SJI . . . to sell any or all of its cellular holdings at reasonable prices." USCC Ex. 1 at 13. La Star is not USCC's only interest in Louisiana. It currently owns a 52 percent interest, as a limited partner, in Baton Rouge MSA Limited Partnership -- a system managed by BMI, which is the general partner. USCC Ex. 1 at 2 n. 3. USCC also has other cellular interests in Louisiana. USCC Ex. 1 at Table 1.

53. Under the La Star Joint Venture Agreement, complete and exclusive power to direct and control the Company is delegated to a Management Committee. La Star Ex. 12, Att. B at Article 4.1. The Agreement provides that three Committee representatives were to be appointed by SJI, the majority partner and two representatives were to be appointed by La Star, the minority partner.

54. From September 1983 to August 1987, the record shows that only one La Star Management Committee meeting occurred. In Brady's testimony he states:

> In February 1987, after the [Maxcell] oral argument but before the Court of Appeals issued its decision, I traveled to New Orleans to meet with the original members of the Management Committee. [La Star Ex. 12 at 13.]

There is no indication why the meeting was not in Larose or whether any other SJI committee member attended. Within the next six months, however, the Star minority venture partners had sold their interest to USCC. La Star Ex. 12, Att. B at Article 4.1.

55. In August 1987, shortly after USCC acquired its interest in Star in 1987, Messrs. John A. Brady, James P. Brady and Sinclair Crenshaw flew to Chicago. A meeting was convened with Leroy Carlson, Sr., Chairman of the Board of TDS, H. Donald Nelson, President of USCC, and Kenneth R. Meyers, Vice President of Finance and Treasurer of USCC in attendance. La Star Ex. 12 at 7. According to Donald Nelson, "[t]here were no actions proposed at that initial meeting." Tr. 1452. One SJI Management Committee member, Crenshaw, indicated, however, that the "general direction" of the meeting was that all FCC application preparation responsibilities were to be borne by USCC. NOCGSA Ex. 9 at 37-39; see also Tr. 984. The Management Committee never met as a whole in person or by telephone thereafter.

56. The following La Star Management Committee appointments were made at the meeting.

John A. Brady - Chairman (SJI)

James P. Brady - Vice Chairman (SJI)

Sinclair Crenshaw - House Counsel (SJI)

Donald Nelson - Member (USCC)

Kenneth Meyers - Secretary/Treasurer (USCC)

57. The Joint Venture Agreement provided for certain formalities governing the affairs of La Star which SJI, as the majority party, and John Brady, as Chairman of the Management Committee, had a duty -- and the right -- to enforce. For instance, under Section 4.2 of the Agreement, the Chairman is responsible for calling meetings of the Management Committee in writing at least quarterly and the Committee is to keep written minutes of those meetings. Section 5.2 requires an annual audit of La Star books and accounts and the distribution of other financial information. Section 4.2 contemplates the prompt election of a general manager and establishment of an engineering subcommittee. La Star Ex. 12, Att. B. None of these provisions was enforced by Brady. Tr. 1078-1079.

USCC Involvement in La Star's Affairs

58. The record reflects that SJI personnel did no work on La Star's 1987 amendment -- except updating SJI's ownership information -- and USCC basically did everything. A September 28, 1987 memorandum from Mark Krohse, Accounting Manager for USCC, to Donald Nelson begins: "The purpose of this memo is to update the development work being done for the La Star filing." NOCGSA Ex. 22, at 2. The memorandum reflects USCC involvement in La Star:

. budgets for pre-operating costs and first year expenses;

. financing commitment for the 1987 Amendment;

. "six site locations" with Ms. Resweber's help;

. site options including coordination with Richard Goehring (USCC's Vice President of Engineering and Operations);

. cell site configuration and the system coverage area and the need for Richard Goehring's coordination with La Star's outside engineering office.

It also talked about the need for Arthur Belendiuk's coordination with USCC counsel. The memorandum closed with assurance to Nelson that he "will be copied on all correspondence relating to La Star." Kenneth Meyers of USCC was also copied. No one at SJI was copied concerning USCC's activities regarding La Star's 1987 amendment, nor did Krohse question the propriety of his failing to contact anyone at SJI. Tr. 1368, 1371, 1373-1374, 1490, 1527, 1569.

59. As had occurred with its predecessor, bills for La Star-related expenses were sent directly to USCC for approval and payment. Tr. 1008; NOCGSA Reb. Ex. 9 at 36-39. There was no clearance procedure or coordination with SJI. Tr. 1008. Nor did SJI receive copies of invoices or checks paid by La Star. In fact, SJI was never kept informed of the level of expense incurred by the La Star Joint Venture, despite making requests for financial information from USCC. Tr. 1186.

60. USCC directly paid Arthur Belendiuk for La Star's legal expenses; USCC directly paid Richard Biby for La Star's outside engineering work; USCC directly paid Dr. Anderson's bills for his demographic work; and USCC directly paid Maxey Resweber, the local real estate agent, for St. Tammany site work. Ms. Resweber paid out the cell site option monies given her by USCC. NOCGSA Reb. Ex. 31 at Bates Nos. 66, 103, 121. All of these people were involved in La Star matters.

61. Krohse (of USCC) generally was in charge of La Star's day-to-day financial matters. He arranged for payment of La Star bills without any SJI coordination, signing checks usually after Donald Nelson signed the invoices and/or the appropriate USCC check request approval forms. NOCGSA Reb. Ex. 9 at 44-45. Mark Ehrman of Pope Ballard, USCC counsel, also requested payment for La Star-related work on occasion. NOCGSA Reb. Ex. 16 at Bates No. 170; Tr. 1532-1533.

62. USCC kept track of La Star-related engineering, legal, real estate, demographic and other license expenses in the same manner as it tracked the license expenses of its other systems -- and in the same internal account for bookkeeping purposes. NOCGSA Reb. Ex. 9 at 64. Account 1306000 included listed expenses for other USCC systems. The account included USCC's expenses incurred on behalf of La Star and commingled La Star-related work performed by USCC attorneys on behalf of USCC. Thus, for example, work performed by USCC counsel (*e.g.*, Pope, Ballard and Koteen & Naftalin) and work performed by La Star (Arthur Belendiuk), were included in the same account without differentiation. Tr. 1534-1345. SJI representatives never reviewed these accounts, which were kept exclusively in Chicago; nor did SJI ever receive any accounting of La Star expenditures incurred by USCC. Tr. 967, 970, 1186-1187, 1536.

63. While no one within SJI worked on any aspect of the La Star 1987 FCC application filing, at least six people at USCC and TDS were involved in La Star matters -- in a manner consistent with USCC's practice of oversight delegation for its many systems. USCC Ex. 1 at 14. Donald Nelson, Richard Goehring, Ken Meyers were the overall coordinating points for USCC personnel involved with La Star work. These USCC officers were themselves responsible for system budgets and Goehring was the coordinating

point for La Star engineering. Tr. 1366, 1487. Nelson was copied on La Star status memoranda and, again, was ultimately responsible for the payment of La Star's expenses. Nelson received La Star-related expense invoices directly. NOCGSA Reb. Ex. 9 at 45; Tr. 1334. Nelson and SJI officials never talked regarding USCC activities on La Star filings. Tr. 1448-1449, 1453-1454.

64. In addition, personnel within USCC worked on the October 26, 1987 amendment without SJI coordination. Donald Nelson, President of USCC, was familiar with Anderson and Ms. Resweber -- consultants hired earlier by Maxcell -- and what they were doing for La Star. Messrs. Brady and Crenshaw, on the other hand, were unfamiliar with them, despite the involvement of these persons on La Star matters -- both before and after the USCC acquisition. Tr. 1040-1042, 1159-1161. Ms. Resweber and Dr. Anderson began working on La Star matters in 1983.

65. Nelson was directly involved with Dr. Anderson's demographic work on behalf of La Star, without SJI coordination. On September 1, 1987, Nelson signed a check request form for Dr. Anderson's update of the original demographic portion of the La Star filing. NOCGSA Reb. Ex. 16 at 2. On September 15, 1987, Dr. Anderson wrote Nelson enclosing draft portions of the October 1987 amendment updating the demographic showing. NOCGSA Reb. Ex. 17. The letter indicated that a copy had been sent earlier to Belendiuk.

66. Dr. Anderson's letter explained why the demographic analysis took longer than expected and would cost somewhat more than USCC had already paid. The letter added: "I will not send you an invoice until we have given you a chance to look at the inclose [sic] materials to see if you want anything added or changed." The letter closed with: "We enjoyed working with you and we wish you well on this application." NOCGSA Reb. Ex. 17 at 1. Dr. Anderson did not send a copy of his draft exhibit -- or his letter -- to anyone at SJI. In fact, at the hearing, Dr. Anderson testified that he did not know "what SJI is...." Tr. 2138.

67. On October 6, 1987, Dr. Anderson again wrote Nelson indicating that he had not heard from Belendiuk about the "demand projections and documentation for St. Tammany Parish" and enclosing an invoice for the La Star work. Dr. Anderson closed by stating: "If there are any questions or problems that arise later, we will be pleased to straighten them out without charge. Good luck with the application." NOCGSA Reb. Ex. 17 at 2. Again, SJI was not copied, and was unknown to Dr. Anderson.

68. Mark Krohse was substantially involved in authorizing payments for La Star-related work, directly coordinating with Ms. Resweber, the local Louisiana real estate agent, on the renewal of options on cell sites; he also was involved in other financial and record-keeping functions for La Star. NOCGSA Reb. Ex. 25, 31; Tr. 1536-2538. He coordinated the preparation of La Star's tax returns with Jim Nicholson of the TDS tax department, who he considered the "main contact point on [La Star] tax matters." Krohse did not coordinate with SJI regarding the filing of the La Star tax returns. He never contacted Crenshaw (SJI's claimed "tax contact") on La Star tax matters. Krohse also handled other miscellaneous La Star matters. He kept Messrs. Nelson, Goehring, and Meyers (all of USCC) advised of La Star developments. Tr. 1238, 1243-1245, 1526-1527, 1531, 1552-1557.

69. Messrs. Nelson and Goehring (of USCC) were actually in charge of preparing the La Star budgets needed to determine the extent of the financial showing for the 1987 and 1988 La Star applications. USCC supplied the cost information relied upon in those filings: Tr. 1531, 1555-1557. Krohse prepared the written budgets under the supervision of Meyers. NOCGSA Reb. Ex. 9 at 52, 53, 55. The USCC budget model and formulas were used. NOCGSA Reb. Ex. 9 at 53. Krohse consulted with Dr. Andy Anderson for customer estimates. Nelson was kept informed. No one at SJI was involved in preparation of the La Star system budgets. NOCGSA Reb. Ex. 9 at 52-55; NOCGSA Reb. Ex. 23, Bates Nos. 154-156.

70. USCC -- through Krohse -- prepared the proposed rate schedule for La Star's 1987 amendment -- again without SJI involvement. Tr. 1552-1553, 1001. USCC (again through Krohse) also prepared La Star's Direct Case Ex. 10, *Schedule of Proposed Charges*. La Star Ex. 10, Dec. of Krohse. Despite the fact that La Star's 1987 amendment, as well as La Star's Ex. 10, which was sworn to by Krohse, state that La Star's proposed rates are cost-based, Krohse indicated that he derived the rates from a USCC book listing cellular rates from operating systems around the parish. NOCGSA Reb. Ex. 9 at 54-55. SJI was not consulted about this exhibit and had no knowledge of how the rate schedule was prepared. Tr. 1001-1002, 1552. Specifically, John Brady testified at hearing that he did not know how La Star's proposed rates were calculated, or who had calculated them. Tr. 1001-1002.

71. Richard Goehring, Vice President of USCC Engineering and Network Operations, was the coordinating point within USCC regarding La Star engineering. Tr. 1366, 1481. There was no similar coordinating counterpart for engineering within SJI. NOCGSA Reb. Ex. 9 at 49; Tr. 980, 985, 992. Goehring also was in charge of the approval of invoices for La Star-related engineering expenses. NOCGSA Reb. Ex. 24. Biby and his assistant, Mark Peabody, La Star's outside engineers, kept Goehring, and his assistant, Gilliland, advised by letter and phone of the work they were performing for La Star -- including site work and the drafting of engineering exhibits. According to Nelson, "Mr. Goehring was available to Mr. Biby, since he had cellular experience, and it was a cross check and a check between the two in regard to engineering matters." Tr. 1354,1483-1486; NOCGSA Reb. Exs. 18-20.

72. With regard to La Star's site work, Messrs. Nelson and Goehring signed the purchase agreements for La Star cell sites. *See* NOCGSA Reb. Exs. 16 and 21. Both were identified on the agreements as USCC officials, rather than agents of La Star. Neither coordinated any of their activities with SJI. In fact, even as of the hearing, Goehring was not familiar with SJI:

> Mr. Tollin: Did you check with anyone at SJI about th[e] affidavit?
>
> Mr. Goehring: I don't know who SJI is.
>
> Mr. Tollin: You don't know who SJI Cellular is?
>
> Mr. Goehring: No . . .

* * *

Mr. Tollin: Do you know who John Brady is:

Mr Goehring: I've heard his name, but I don't know John Brady. I've never met him. Tr. 1478

* * *

Judge Chachkin: Well, when you received these letters [from Mr. Biby] addressed to you, did you send them to anyone at SJI?

Mr. Goehring: No

Judge Chachkin: Why not?

Mr. Goehring: To be honest I didn't know who SJI was, Your Honor.

Judge Chachkin: Did you make any effort to determine who SJI was?

Mr. Goehring: No, I did not.

Judge Chachkin: Were you given any instruction by anyone at USCC that if you received communications concerning La Star you were to send those communications on to SJI?

Mr. Goehring: No. Tr. 1489-1490.

73. USCC (through Krohse) was also involved in La Star cell site work and Krohse reported his activities in status memoranda to Messrs. Nelson and Goehring. Tr. 1525; NOCGSA Reb. Exs. 18-24. Again, no one at SJI was copied on this material. Documents between Krohse and Ms. Resweber indicate they worked closely with one another on renewal of options on the La Star cell sites. NOCGSA Reb. Exs. 31-32. Again, while Messrs. Nelson, Goehring, Meyers and Belendiuk are copied on most of the documents, SJI representatives never were. Krohse confirmed that he was not coordinating with SJI and he testified that it never even occurred to him to do so. Tr. 1561-1564. None of Ms. Resweber's correspondence to Mark Krohse at USCC reflects any coordination with SJI or Belendiuk.

74. John Brady was not aware that Ms. Resweber worked on La Star sites for the 1983, 1987, and 1988 filings; and he was unaware that she helped keep track of La Star site renewals. Tr. 1041-1042. Brady testified that no one at SJI was the contact point for cell sites. Tr. 992. Neither he nor Crenshaw were aware of USCC's involvement. Tr. 984, 1042, 1146-1147, 1157- 1161.

75. Up to release of the *HDO*, the La Star site agreements were kept in Chicago and not in Larose. Tr. 990-991. When shown the site renewals, Crenshaw said he had never seen them and could not identify the USCC signatures. Tr. 1151-1155. He indicated at the hearing that he was not involved with any negotiations; nor did he perform any legal review of the terms of the site agreements. Tr. 1156-1157. Shortly after the *HDO* was released, SJI officials began, for the first time, signing the site renewals and, for the first time, Crenshaw began direct coordination with Richard Biby, La Star's consulting engineer. Tr. 1141.

76. TDS obtained the financial commitment letters supporting La Star's October 1987 amendment. The financial qualifications section to La Star's October 1987 amendment first included the consolidated balance sheets of TDS and related consolidated statements of income. No financial information was provided about SJI. Next, a letter dated the same day as the filing - October 26, 1987 - was submitted. This letter was from the Harris Bank of Chicago to Murray Swanson, Vice President-Finance of TDS and provided TDS an unsecured term loan of $4,500,000 at the prime interest rate. The loan proceeds were for the stated purpose of constructing and operating a cellular mobile radio system in New Orleans, Louisiana, but no mention is made of La Star or SJI. The letter also reflects that TDS paid a first year's commitment fee of $11,250 to obtain the loan, and that TDS would also pay $11,250 annually to extend the loan commitment. La Star 1987 amendment, Ex. L-4.

77. USCC negotiated the terms. No one at SJI was involved in negotiating this loan with the Harris Bank. Tr. 996-997; NOCGSA Reb. Ex. 9 at 69. A second loan commitment letter, also dated October 26, 1987, from Murray Swanson at TDS to John Brady was also included in the 1987 amendment, committing TDS to loan La Star $4,500,000 at an interest rate of prime plus 2 percent. The TDS loan to La Star was secured "by a first lien on [La Star's] real property and first security interest in its personal property . . . ." (except for equipment vendor purchase money liens). The La Star loan had a maturity date five years after the loan closing date. Also included in La Star's 1987 Exhibit L-4 are estimates of La Star's capital costs and first year operating costs submitted to verify the sufficiency of the loan. This material was prepared by USCC. Tr. 1554.

78. When La Star's application was reinstated on October 26, 1987, both parties filed extensive amendments. Each filed an opposition to the other's amendment on February 16, 1988. Among other things, NOCGSA contested La Star's cost estimates and the adequacy of the applicant's financing for its proposed construction of a six-cell system all in one year. No Management Committee meeting or conference call was convened by John Brady in response to this development.

79. On February 19, 1988, Krohse (of USCC) sent another La Star status memorandum to Messrs. Nelson, Meyers and Goehring alerting them to the need to respond to NOCGSA's petition to deny and, specifically, the need to respond to NOCGSA's charge that La Star's financing was insufficient. Tr. 1554. The memorandum reflects separate coordination efforts concerning the NOCGSA petition between Belendiuk and Nelson and the following additional topics:

Mark Peabody and Arthur Belendiuk had inquired whether USCC had hired a firm called Advanced Consulting (which had been holding out that they represented La Star in seeking to obtain options on La Star land sites);

the need to renew the La Star cell site options in March, 1988;

A request by Mr. Belendiuk that USCC "should send a site engineer to the area in order to secure the necessary locations;" and

Mr. Belendiuk's request for cost projections for an interim operation system and a bank letter of credit for the application. NOCGSA Ex. 15.

Once again, USCC failed to coordinate directly with SJI. Tr. 1340-1342.

80. Thereafter, on March 2, 1988, La Star filed its Reply to Petition to New Orleans CGSA, Inc. to Dismiss and Deny the Application and Amendments of La Star Cellular Telephone Company. The pleading was supported by an affidavit of Goehring of USCC, to support the equipment costs and first year operating estimates contained in La Star's October 1987 amendment. The affidavit detailed how USCC had built comparable systems within the budget and financial commitment supplied to the Commission. Goehring did not work or coordinate with anyone at SJI with regard to preparation of his affidavit. In fact, he did not know who SJI was. Tr. 1477-1479.

81. The sites for the cells proposed in La Star's application for interim authority filed February 29, 1988 were obtained by local real estate agents working in conjunction with USCC personnel. Biby, the La Star consulting engineer, also coordinated his engineering efforts with USCC. USCC also prepared the budget for the system. No Management Committee meeting or telephone call was convened prior to this filing. None of the exhibits for the interim filing were prepared by SJI or even coordinated with SJI. Tr. 1033.

82. This application also included financial information about TDS. Again, there was a loan commitment letter to TDS, this time from the Australia and New Zealand Banking Group Limited (ANZ), dated February 26, 1988, for an unsecured loan of $3,500,000 at the bank's prime rate. The loan is for the stated purpose of constructing and operating an interim cellular system in New Orleans and, again, neither SJI nor La Star is mentioned. The letter reflects that TDS would pay all loan extension fees. As with the 1987 amendment, the financial commitment for the interim operating application again included a second letter from TDS to John Brady, dated February 26, 1988. This letter committed the same loan amount, on a secured basis, to La Star at prime plus 2 percent. The La Star loan again was "to be secured by a first lien on its real property and first security interest on its personal property." The loan had a maturity date five years after the closing or upon termination of interim operating authority. Again, this underlying loan was negotiated by TDS and the ANZ Bank. La Star February 1988 Interim Cellular System App., Ex. 5. Again, SJI was completely uninvolved. Brady had no idea why TDS changed financial institutions for the interim filing. Tr. 1046-1047.

83. Neither Brady nor Crenshaw (both of SJI) knew whether USCC's predecessor interest-holder in Star filed tax returns for La Star during the period 1983-1987. Tr. 1057. Crenshaw suspected they had, since La Star had a taxpayer I.D. number. Crenshaw did not know how La Star had obtained its taxpayer I.D. number. Tr. 1169. Neither SJI representative ever received a copy of any tax returns filed for La Star by the minority partner -- from 1983 to the date of the hearing. While Crenshaw considered himself "La Star's counsel's contact point . . . for tax matters," (La Star Ex. 13), he knew nothing about the 1983-1987 tax filings made -- or not made -- by La Star. Tr. 1169.

84. Sometime in 1987, Crenshaw became a member of the Management Committee.He considered himself House Counsel for La Star. He has a background in tax and accounting matters. He has a law degree and is licensed to practice in Louisiana; he is also a CPA in Louisiana and has worked as a tax specialist at Peat Marwick. He also has an MBA degree. Tr. 1138, 1168. Notwithstanding, TDS or USCC prepared and filed La Star's 1988 and 1989 tax returns. On the 1988 return, La Star elected the accrual method of accounting. On the 1989 return Star Cellular (owned by USCC) was designated tax matters partner on the form; again the accrual method was elected. All of this occurred without any SJI contact or knowledge and without Management Committee discussion. Tr. 1175. The address listed on the returns for La Star was that of USCC. At the depositions and at the hearing, Messrs. John Brady and Crenshaw did not recognize the address listed on the La Star tax returns. NOCGSA Reb. Ex . 9 at 97. A TDS employee signed the 1988 return while a USCC employee, Mark Krohse, signed the 1989 return. La Star Ex. 32. The signatures on the 1988 and 1989 tax returns could not be identified by Messrs. Brady and Crenshaw, even when shown the returns at hearing. Tr. 1067, 1173-1174.

85. The only documented SJI contact regarding La Star's tax matters occurred around June 16, 1989 when the IRS sent a letter to SJI because, despite efforts to resolve La Star's account, they had no record of receiving La Star's 1988 return. NOCGSA Reb. Ex. 14. Crenshaw faxed the IRS notice to Nelson at USCC because "it was obvious to me that one of the responsibilities that U.S. Cellular was responsible for performing had not been performed." NOCGSA Reb. Ex. 9 at 63.

86. While he considered himself the La Star tax matters contact point, he did not talk to Nelson or anyone else at USCC about this matter; nor did he receive written confirmation that the 1988 return was filed. Tr. 1180-1181. After the "fax" message was received by USCC, Krohse called Crenshaw's secretary, Allison, and indicated the fax had been received; Krohse never spoke to Crenshaw directly on this or on any other La Star matters. At hearing, Krohse testified that he considered Allison, the SJI secretary, to be his tax matters contact at SJI. Tr. 1244.

87. Unbeknown to Crenshaw, SJI received a *second* IRS notice on December 11, 1989 -- after the IRS did not receive the first TDS-prepared 1988 La Star return. Krohse received word about the second IRS delinquency notice from Allison. Again, Krohse did not speak with Crenshaw about the second IRS notice. Krohse considered his main contact for La Star tax matters to be Jim Nicholson of the TDS tax department. Tr. 1243-1244. Crenshaw never received a copy of the return and was not aware that the return was prepared by TDS. Tr. 1180-1183.

88. Brady had no idea whether the tax returns contained any information about La Star-related expenditures being incurred by USCC. Tr. 1060-1061, 1133. Brady and Crenshaw were aware that the La Star debt was to be reimbursed out of the profits of the system. Tr. 969, 1184, 1190. As it turned out, the La Star returns did not contain any numbers and thus could have been easily prepared by SJI. La Star Ex. 32.

89. From 1983 to release of the *HDO* -- May 31, 1990 -- the financial records of La Star were kept exclusively by the minority partner, Star. *No* copies of bills and ledgers recording La Star debt levels were kept in Larose (La Star headquarters), nor did SJI ever request that these docu-

ments be sent to Larose. Tr. 967; NOCGSA Reb. Ex. 9 at 46. Neither Brady nor Crenshaw ever saw any La Star financial records, again despite their awareness that the amounts expended by USCC on behalf of La Star were to be reimbursed by La Star --and thus by SJI. Tr. 1186-1187, 1188, 1013-1014.

90. On two occasions, Brady asked Crenshaw to get an accounting from USCC of the La Star debt level. Tr. 1008, 1186. Despite SJI's request, USCC never provided any La Star financial information to SJI, and SJI never demanded that this information be provided it. No La Star accounting from USCC was ever given to SJI. In this regard, Crenshaw testified as follows:

> Mr. Tollin: Would it make sense to do some sort of an accounting of expenses being accumulated by a minority partner where . . . those expenses being accumulated are going to come out of the profits of the enterprise?
>
> Mr. Crenshaw: To answer your question any other way, the way -- the way you posed it would make me seem as an idiot. Tr. 1225.

In addition, neither Messrs. Brady or Crenshaw had any idea of the debt levels carried by Star prior to USCC's acquisition. Tr. 967, 1192.

91. Nelson testified that as of March 1991, "USCC has paid a total of $513,000 as its share of La Star's litigation and other expenses." He also testified that the La Star interest is "currently carried on USCC's books at $840,000 . . . ." USCC Ex. 1 at 11. (The record does not reflect the level of debt accumulated by USCC's predecessor interest-holder in Star.)

92. The Joint Venture Agreement was amended, dated June 1990. According to USCC and SJI, the amendment was effective as of May 31, 1990. According to USCC and SJI, the Joint Venture amendment provides that, as of May 31, 1990, all La Star expenses will be ratably shared by USCC and SJI, based on their ownership percentages. According to USCC and SJI, the amendment eliminates the need for La Star (and SJI) to reimburse any expenses incurred on behalf of La Star up to May 31, 1990. In addition, again according to USCC and SJI, the La Star expenses incurred by USCC's predecessor interest-holder in Star (Star Telephone/Maxcell) were also forgiven. None of these matters is specifically addressed in the amendment. La Star Ex. 12, Att. C.

93. The new financial procedures, whereby SJI assumed the payment of the bills and its 51 percent share of La Star's expenses, was first established on July 19, 1990 -- the day after Nelson's deposition in Chicago. NOCGSA Reb. Ex. 9 (Crenshaw) at 16-20. John Brady's testimony, and documents produced at the Larose depositions, confirm that no bills for La Star expenses were paid by SJI before July 19, 1990. NOCGSA Reb. Ex. 9 (Brady) at 60. Moreover, as of the July 25 Larose depositions, SJI had still not paid its share of the La Star hearing fee. NOCGSA Reb. Ex. 9 (Brady) at 60. The documents produced also indicate that, as of July 1990, and for the first time, SJI personnel were now signing cell site renewals themselves. Brady testified that he had no La Star books and records, but that La Star's financial records would now be kept in Larose.

Contingent Comparative Issues

94. Contingent comparative issues 1 and 5 contain the "community of interest issues." Under issue 1, the question to be resolved is whether there is a "close connection" between St. Tammany Parish and the remainder of the New Orleans MSA. NOCGSA's expert witness concerning issue 1 is Janet F. Speyrer, Ph.D. La Star relies on Dr. Andy B. Anderson as its "community of interest" expert. Issue 5 requires a determination whether there will be public interest benefits if the same entity operates in St. Tammany Parish and the city of New Orleans.

Community of Interest (Issue 1)
Dr. Speyrer and Dr. Anderson
Background/Qualifications

95. Dr. Speyrer received her Ph.D. in Economics from Johns Hopkins University in 1982. In 1978, she received an M.A. in Economics from Johns Hopkins, and in 1976 she received her B.A. (*cum laude)* in Mathematics/Economics from Rice University. NOCGSA Dir. Ex. 6 at Appendix 1. Dr. Speyrer has lived in Louisiana for about 8 1/2 years. Tr. 1861.

96. Dr. Speyrer is trained as an Urban Economist and has worked in that field for more than 10 years. She is an Assistant Professor of Economics at the University of New Orleans (UNO). She also serves as the Associate Director of the UNO Division of Business and Economic Research. NOCGSA Dir. Ex. 6 at Appendix 1. Dr. Speyrer is qualified to teach Urban Economics, Public Finance, State and Local Public Finance, Government Regulation and Economic Theory. At UNO, Dr. Speyrer has taught courses in Microeconomics and Public Finance. She also has taught undergraduate and graduate level courses in Urban Economics. Tr. 1862.

97. Dr. Speyrer has published papers in the field of urban economics. NOCGSA Dir. Ex. 6 at Appendix 1. She recently had an article accepted for publication in the *Journal of Real Estate Finance and Economics* dealing with the impact of flood risk and mandatory flood insurance on suburban and urban property values. Tr. 1865-1866. Among other things, this article required analysis of data from urban and suburban neighborhoods within a metropolitan area. Tr. 1865-1866.

98. From 1984 through 1986, Dr. Speyrer worked as a Financial Economist in the Office of Tax Analysis, U.S. Department of Treasury. NOCGSA Ex. 6 at Appendix 1. She worked on what became the "Tax Reform Act of 1986" and analyzed tax policy and revenue implications of different legislative changes in tax policy. Tr. 1862.

99. As Associate Director of the University of New Orleans' Division of Business and Economic Research, Dr. Speyrer examines economic issues and economic data pertaining to the New Orleans metropolitan region. Tr. 1862-1863. The Division publishes statistical data for the New Orleans metropolitan area and prepares quarterly reports on socioeconomic and demographic data for the area. The Division also prepares economic impact studies and applied studies. Tr. 1862-1863.

100. Dr. Andy B. Anderson, La Star's "community of interest" expert, is a Professor of Sociology at the University of Massachusetts, Amherst, where he teaches undergraduate and graduate courses in survey research and statistical analysis. La Star Ex. 6, at Anderson Declaration. Dr Anderson is not an urban economist. Tr. 2127. Dr.

Anderson never visited St. Tammany Parish or surveyed the area in connection with his work for La Star. Tr. 2137.

101. Dr. Anderson and Dr. Wright are partners in New England Research Associates, a research consulting firm that provides survey market and demographic analysis. La Star Ex. 6, at Anderson Declaration. Drs. Anderson and Wright have prepared all of La Star's demand/demographic exhibits, since 1983. Tr. 2132-2135. Drs. Anderson and Wright also provided demand/demographic studies for "hundreds" of Maxcell Telecom Plus cellular applications. Their demand/demographic exhibits were prepared using a prediction model. According to Dr. Anderson, the model allowed them to do "hundreds" of cellular markets in a day or "maybe" two days. Tr. 2135-2136.

St. Tammany Demographic/Geography

102. St. Tammany is part of the New Orleans MSA, but is physically bounded to the South by Lake Pontchartrain. Directly across the Lake are the most populated portions of the New Orleans MSA: Orleans Parish, which contains the city limits of New Orleans, and Jefferson Parish, the Parish immediately to the west of Orleans. Western St. Tammany (and in particular the Mandeville/Covington area) is physically connected to Jefferson Parish by the Lake Pontchartrain Causeway. The 24 mile Causeway provides the most direct link between western St. Tammany and the Orleans/Jefferson area. However, according to the 1980 Census, less than 30% of the total St. Tammany commuters used the Causeway route. The remainder use three other St. Tammany commuter routes: the Interstate 10 Twin Spans, the U.S. Highway 11 bridge and U.S. highway 90 bridge. NOCGSA Dir. Ex. 6 at 3, 11-12; NOCGSA Reb. Ex. 6 at 1, 21-26, 30; Tr. 1883, 1888-1889, 1938.

103. While the Lake Pontchartrain Causeway is the longest over water bridge in the United States, the average commuting time for St. Tammany Parish workers is comparable to other suburban communities around the Country. According to the 1980 Census, the average St. Tammany commute was 30.2 minutes and the average Jefferson commute was 24.7 minutes. By comparison, the average Fairfax County, Virginia commute was 28.8 minutes and the average Montgomery County, Maryland commute was 27.2 minutes; the average Cobb County, Georgia commute was 25.4 minutes. NOCGSA Reb. Ex. 6 at 22.

104. St. Tammany Parish has been one of the fastest growing Parishes in Louisiana. It has grown over 400 percent since 1950. The Parish's population grew from a 1950 Census figure of 26,988, to a 1960 Census figure of 38,643, to a 1970 Census figure of 63,585, to a 1980 Census figure of 110,869. NOCGSA Dir. Ex. 6 at 6.

105. St. Tammany's population grew by 74.4 percent from 1970 to 1980. In 1980, the Census Bureau classified 41.3 percent of the Parish population as urban. NOCGSA Dir. Ex. 6 at 17. Of the 1980 population, 50.4 percent was female and 49.6 percent was male. The 1980 St. Tammany household count was 35,695. The Real Estate Market Data Center at the University of New Orleans (*New Orleans Housing Market Analysis*, 1990) estimated the 1989 number of St. Tammany households at 49,354 (representing a 38.3 percent growth rate over the 1980 count). NOCGSA Dir. Ex. 6 at 7.

106. According to the 1980 Census, median household income for St. Tammany residents (in 1979) was $19,806. More recent data from CACI, a national consulting firm (*The 1988 Sourcebook of Demographics and Buying Power for Every County in the USA)* indicate that, by the year 1988, the median income of St. Tammany households rose 52 percent to $30,112. NOCGSA Dir. Ex 6 at 8.

107. U.S. Department of Commerce, Bureau of Economic Analysis figures indicate that total personal income in St. Tammany Parish rose from $1,108.9 million in 1980, to $2,136.4 million in 1988 (representing a growth rate of 92.7 percent). During that same period, *per capita* personal income rose from $9,886 to $14,201 in 1988 (an increase of 43.6 percent). NOCGSA Dir. Ex. 6 at 8. *See* Table 3 at Appendix A.

St. Tammany's Inclusion In the New Orleans MSA

108. Generally speaking, an MSA includes a central city (or cities) with a specified population, as well as those "outlying" counties, if any, with close and quantifiable ties to the city. NOCGSA Dir. Ex. 6 at 13. Before 1983, MSAs were referred to as "Standard Metropolitan Statistical Areas" or SMSAs. NOCGSA Dir. Ex. 6 at 13.

109. The Department of Commerce has defined the MSA concept as follows:

> The general concept of a metropolitan statistical area is one of a large population nucleus, together with adjacent communities which have a high degree of economic and social integration with that nucleus.
>
> * * *
>
> Each metropolitan statistical area has one or more central counties, containing the area's main population concentration. A metropolitan statistical area may also include outlying counties which have close economic and social relationships with the central counties. Such counties must have a specified level of commuting to the central counties, and must also meet certain standards regarding metropolitan character, such as population density. *Department of Commerce, Office of Federal Statistical Policy and Standards, MSA Classification, Notice of Final Standards*, 45 Fed. Reg. 956 (Jan. 3, 1980), Appendix 8. *See* NOCGSA Dir. Ex. 6 at 13.

110. Urban economist James Heilbrun defines the MSA classification as follows:

> With minor exceptions, the central city, together with its surrounding densely settled urban fringe, must have a population of at least 50,000. An MSA . . . consists of (1) the county or counties containing the central city and (2) all contiguous counties that have close economic ties to the county or counties containing the central city and are sufficiently urban in character. NOCGSA Dir. Ex. 6 at 13, quoting Heilbrun, *Urban Economics and Public Policy*, 3rd Edition (1987, p. 23).

111. According to urban economist Heilbrun, the "Census Bureau [MSA] definition treats the web of journeys from home to workplace as primary evidence that the regional population forms an integrated social and economic system." NOCGSA Dir. Ex. 6 at 17, *quoting* Heilbrun, *Urban Economics*, 1987, p. 23.

112. St. Tammany Parish first qualified for inclusion as part of the New Orleans MSA in 1963, as a result of the 1960 Census count. NOCGSA Dir. Ex. 6 at 14. Tr. 1985. *See* OMB requirements at Appendix 6, *"1960 Census of Population: Supplementary Reports,"* April 10, 1961, pp. 4-5. St. Tammany Parish has continuously satisfied the requirements for inclusion within the New Orleans MSA since it was first added. NOCGSA Dir. Ex. 6 at 14.

113. Between 1960 and 1970, the population of St. Tammany Parish grew by 64.5 percent. Based on the 1970 Census count, St. Tammany Parish again satisfied the Department of Commerce published OMB criteria for inclusion within the New Orleans MSA. NOCGSA Dir. Ex. 6 at 14. *See OMB, Standard Metropolitan Statistical Areas*, 1975, at 1-2 (Appendix 7). In 1970, 17.2 percent of St. Tammany workers commuted to Orleans Parish, the central city of the MSA. Tr. 1997.

114. The applicable 1970 OMB standard for inclusion of an outlying county within an MSA was as follows:

> 2. A contiguous county will be included in a standard metropolitan statistical area if:
>
> a. At least 75.00 percent of the resident labor force in the county is in the nonagricultural labor force, *and*
>
> b. At least 30.00 percent of the employed workers living in the county work in the central county or counties of the area.
>
> 3. A continuous county which does not meet the requirements of criterion 2 will be included in a standard metropolitan statistical area if at least 75.00 percent of the resident labor force is in the nonagricultural labor force and it meets two of the following additional criteria of metropolitan character and one of the following criteria of integration.
>
> a. Criteria of metropolitan character.
>
> (i) At least 25.00 percent of the population is urban.
>
> (ii) The county had an increase of at least 15.00 percent in total population during the period covered by the two most recent Censuses of Population.
>
> (iii) The county has a population density of at least 50 persons per square mile.
>
> b. Criteria of integration
>
> (i) At least 15.00 percent of the employed workers living in the county work in the central county or counties of the area, *or*
>
> (ii) The number of people working in the county who live in the central county or counties of the area is equal to at least 15.00 percent of the employed workers living in the county, *or*
>
> (iii) The sum of the number of workers commuting to and from the central county or counties is equal to 20.00 percent of the employed workers living in the county. NOCGSA Dir. Ex. 6 at 14-15. *See* Appendix 7, *OMB Standard Metropolitan Statistical Areas*, 1975 (pp. 1-2).

St. Tammany qualified for inclusion in the New Orleans MSA following the 1970 Census according to criterion (3) of this definition. Tr. 1993-1998.

115. Following the 1980 Census, St. Tammany once again satisfied the OMB criteria and continued to qualify for inclusion within the New Orleans MSA. NOCGSA Dir. Ex. 6 at 16-17. The applicable 1980 standard was as follows:

> 1. Counties with a commuting rate of 50 percent or more must have a population density of at least 25 persons per square mile.
>
> 2. Counties with a commuting rate of 40 to 50 percent can qualify if they have a density of at least 35 persons per square mile."
>
> 3. Counties with a commuting rate of 25 to 40 percent typically qualify through having a density of at least 50 persons per square mile, or at least 35 percent of their population classified as urban by the Bureau of the Census.
>
> 4. Counties with a commuting rate of 15 to 25 percent must have a density of at least 50 persons per square mile, and in addition must meet two of the following four requirements.
>
> a. The population density must be at least 60 persons per square miles;
>
> b. At least 35 percent of the population must be classified as urban;
>
> c. Population growth between 1970 and 1980 must be at least 20 percent;
>
> d. A significant portion of the population (either 10 percent or at least 5,000 persons) must live within the urbanized area. *Id.* at 16-17.

St. Tammany qualified for inclusion in the New Orleans MSA following the 1980 Census according to criterion (4) of this definition. Tr. 2000-2003.

116. According to the 1980 Census, the population density of St. Tammany Parish was 127 persons per square mile – 110,869 people distributed over 873 square miles. NOCGSA Dir. Ex. 6 at 17.

St. Tammany Commuting Data

117. The 1980 Census data establish that numbers of St. Tammany Parish workers regularly travel to Orleans Parish, as well as to other parts of the New Orleans MSA. NOCGSA Dir. Ex. 6 at 18. The commuting rate to Orleans Parish helped qualify St. Tammany for continued inclusion within the New Orleans MSA since 1963.

NOCGSA Dir. Ex. 6 at 13-14. The 1980 Census data reveal the following St. Tammany commuting information:

. 33,775 (80.3 percent) of the 42,036 total St Tammany workers (aged 16 years of age and over), worked inside the New Orleans SMSA.

. 2,627 (6.2 percent) of St. Tammany worker respondents reported that they worked outside the New Orleans SMSA.

. 9,499 (22.6 percent) of St. Tammany workers commuted to Orleans Parish.

. 2,470 (5.9 percent) of St. Tammany workers commuted to Jefferson Parish.

. 710 (1.7 percent) of St. Tammany workers commuted to St. Bernard Parish.

. 5,634 (13.4 percent) of St. Tammany worker respondents did not answer Census commuting questions. NOCGSA Dir. Ex. 6 at 18; NOCGSA Reb. Ex. 6 at 18-19.

118. The daily commuting rate for St. Tammany residents to Orleans, Jefferson and St. Bernard Parishes combined was 30.2 percent. To put St. Tammany commuting statistics in context, in 1980, 25.8 percent of Montgomery County residents and 23.7 percent of Fairfax County residents commuted to the central city of the District of Columbia. NOCGSA Reb. Ex. 6 at 17-18. In 1980, 26.3 percent of Cobb County residents commuted to the central city of Atlanta. NOCGSA Reb. Ex. 6 at 18. Lastly, in 1980, 28.1 percent of Jefferson residents commuted to the central city of New Orleans. NOCGSA Reb. Ex. 6 at 17.

119. Dr. Speyrer considered St. Tammany Parish's inclusion within the New Orleans MSA as "primary evidence" that there is a "community of interest" or "close connection" between the areas, and that the areas have close economic and social ties. NOCGSA Dir. Ex. 6 at 16; Tr. 1871, 1904-1905, 1906, 2018- 2019.

120. Because of population changes in St. Tammany since the 1980 Census count, Dr. Speyrer extrapolated more recent 1990 St. Tammany commuting data based on a methodology she devised. Dr. Speyrer has prior experience in developing extrapolation models of this kind. Dr. Anderson testified that Dr. Speyrer's commuting growth rate estimate was "probably pretty close to the mark on the rate." Dr. Speyrer also submitted evidence corroborating her Causeway commuting growth rate estimate. NOCGSA Dir. Ex. 6 at 18-19, 23; Tr. 2029-2032, 2055-2058, 2144. Accordingly, the record supports consideration of her extrapolation methodology.

121. Dr. Speyrer examined the highest volume traffic routes across Lake Pontchartrain and extrapolated 1990 commuting rate totals from St. Tammany Parish to traffic zones in Jefferson, Orleans and St. Bernard Parishes. NOCGSA Dir. Ex. 6 at 18, 19, 24. She estimated the 1980-1990 Causeway growth rate at 91.43 percent. NOCGSA Dir. Ex. 6 at 21-22. Dr. Speyrer estimated the 1980-1990 Interstate 10/U.S. Highway 11 commuting growth rate at 19.9 percent. NOCGSA Dir. Ex. 6 at 21-22. This data reflects a ten-year St. Tammany commuting growth rate estimate on both principal commuter routes of 40.8 percent. Dr. Speyrer's extrapolation indicates that significant numbers of St. Tammany residents commute daily to Orleans, Jefferson and St. Bernard Parishes. NOCGSA Dir. Ex. 6 at 22.

St. Tammany Economic Dependence On New Orleans

122. NOCGSA's Dir. Ex. 6 contains information which indicates that the economy of St. Tammany Parish is dependent on New Orleans. Thus, 1987 information from the U.S. Department of Commerce, Bureau of Economic Analysis reveals that more dollars were earned by St. Tammany residents employed in other parishes than were paid by St. Tammany employers to residents of other parishes. NOCGSA Dir. Ex. 6, Tab A, Table 3. Specifically, the St. Tammany figure for "adjustments for residence" in Table 3, Tab A of that exhibit represents the amount of income earned by St. Tammany residents outside the parish which exceeds the amount non-residents earned in St. Tammany Parish. *Id.* at 9. That figure is $924.5 million, which is 43.3 percent of the total personal income earned by residents of St. Tammany Parish. Thus, this data indicates that St. Tammany residents earn much of their income outside the parish. Table 6, Tab A of NOCGSA's Dir. Ex. 6 reports per capita receipts in various service sectors for St. Tammany Parish as compared to Orleans and Jefferson Parishes combined. The per capita service receipts for Orleans and Jefferson Parishes clearly surpass those of St. Tammany Parish in most categories, including "business services" (more than three times as many receipts), legal services (about five times as many receipts), engineering, accounting and research services (about three times as many receipts) and hotels, rooming houses, camps and other lodging places (about nine times as many receipts). These figures indicate that St. Tammany Parish's economy is not sufficiently diversified to support certain types of business activity and is thus dependent on New Orleans for certain economic activities. *Id.* at 11. *See also*, NOCGSA Reb. Ex. 6 at 26-32.

Social and Political Connections Between St. Tammany and New Orleans

123. There are several aspects of life in St. Tammany Parish which indicate strong social and political connections between that parish and the New Orleans MSA. Thus, Table 9, Tab A of NOCGSA's Dir. Ex. 6 demonstrates that 51 percent of the households in St. Tammany Parish subscribe on a daily basis to *The Times Picayune*, a New Orleans newspaper. Further, except for two local AM broadcast stations, many of the non-local radio broadcast stations received in the parish are New Orleans stations and all of the television signals clearly received in St. Tammany Parish, including the three network affiliates, are broadcast on New Orleans stations. NOCGSA Dir. Ex. 6, p. 27. It also appears that people in St. Tammany Parish rely on institutions in other parts of the New Orleans MSA for higher education, including colleges and trade schools. *Id.* at 28. St. Tammany residents utilize medical service and facilities in Orleans Parish, *Id.* at 29, as well as restaurants, museums and jazz clubs in New Orleans. *Id.* at 30-31. Further, the First Congressional District of Louisiana includes portions of Jefferson and Orleans Parishes and all of St. Tammany Parish. *Id.* at 33. Thus, the geographic composition of the First District, which spans Lake Pontchartrain, indicates a political community of interest between St. Tammany Parish and the New Orleans MSA.

The M/A/R/C Study Of St. Tammany Residents

124. NOCGSA's Direct Exhibit 7 contains a telephone survey (Study 1601161) of St. Tammany residents aged 18 or over conducted by M/A/R/C/ Inc. The study utilized the ransom digit dialing sampling approach. The study results show that St. Tammany Parish has a social and economic community of interest with New Orleans and that this tie is significantly stronger than St. Tammany's ties with other urban centers in the area, like Gulport and Biloxi, Mississippi. NOCGSA Dir. Ex. 6, p. 32. For example, over 90 percent of the respondents felt that St. Tammany is "tied most closely to" New Orleans rather than Gulfport or Biloxi. NOCGSA Dir. Ex. 7, p. 10.

125. Dr. Anderson contends there is no community of interest between St. Tammany Parish and Orleans Parish; it is his view that the level of commuting outside the Parish is insufficient to establish a "community of interest." La Star Ex. 6 at 4-7. Dr. Anderson's position, as expressed at the hearing, contrasts with his view prior to the hearing. In Exhibits filed on behalf of La Star in 1983 and 1987, Dr. Anderson stated there was "sizeable" commuter traffic in St. Tammany Parish. He stated that analysis of 1980 Census data reveal that the "St. Tammany population is highly mobile" and that a "substantial proportion of the workforce travels outside [St. Tammany] Parish to work." La Star 1983 Application, Ex. L-8 at 6-7. Dr. Anderson concluded in 1987 that St. Tammany was an "affluent bedroom community for people working in the New Orleans SMSA . . . ." La Star 1983 Application, Ex. L-8 at 6-7. Dr. Anderson did not address or explain in his hearing exhibits why his earlier statements concerning St. Tammany were no longer valid (*e.g.*, changes in the Parish between 1987 and 1990). La Star Exs. 6 and 23. At hearing, Dr. Anderson could not cite any factors that had changed. Instead, he said that there was "a change in the point of view that [he] used in looking at the data. Tr. 2148. In this regard, Dr. Anderson stated that he prepared his hearing exhibits pursuant to La Star counsel's direction and that counsel told him "what to do, how to do it, what form to put [it], what to take out, [and] what to put in." Tr. 2187.

126. Dr. Anderson testified that, while he never consulted the *HDO*, he understood the relevant issue to be "whether or not St. Tammany should be considered in some sense as part and parcel of the larger metropolitan region of New Orleans." Tr. 2131. This is the analysis undertaken by Dr. Speyrer, and is the proper issue to be examined in resolving *HDO* Issue No. 1. However, in analyzing the issue, Dr. Anderson applied the test whether St. Tammany "is so dependent on New Orleans or some other area for its economic activity that it has very little economy of its own . . . ." Tr. 2155-2156. According to Dr. Anderson, he looked at the issue in the following way: "is there so little internal economic activity that [St. Tammany] by itself would just cease to function if it were somehow removed from the New Orleans area." Tr. 2156. This standard bears no relation to *HDO* Issue No. 1. Moreover, virtually no area would qualify as part of a metropolitan area under Dr. Anderson's arbitrary test.

127. In addition, Dr. Anderson only presented evidence concerning St. Tammany and the New Orleans city limits (Orleans Parish). Dr. Anderson did not examine aspects of the larger metropolitan area in making his report, nor did he consider any ties between St. Tammany and Jefferson Parish. La Star Ex. 6. At the hearing, Dr. Anderson recognized that New Orleans and St. Tammany are part of a regional economy and that the areas have "ties." Tr. 2157, 2149, 2156-2158. He also testified that he would not be surprised if the data reflected ties between New Orleans and Jefferson Parish. Tr. 2163.

128. Dr. Anderson's requirement that St. Tammany have so little internal economic activity that it "would just cease to function if it were somehow removed from the New Orleans area," (Tr. 2155-2156) sets an impossible and unrealistic hurdle for considering whether a suburban area is tied to a metropolis. Dr. Anderson's community of interest criteria is not based on the MSA classification requirements or supported by academic or other references. Tr. 2155. The OMB makes no requirement in its MDS definition that "outlying counties" have little or no internal economic activity. In fact, any metropolitan community that provides a suburban location for urban residents routinely develops an internal economy, as it satisfies the needs of its residents to purchase goods and services close to their homes. Other types of economic activity also develop as the local area grows. NOCGSA Reb. Ex. 6, Tables 5 and 6; NOCGSA Reb. Ex. 6 at 11, 16-17, 26-32. Thus, the existence of a strong and growing retail sector in St. Tammany does not disprove the existence of ties between St. Tammany and the New Orleans metropolitan economic structure. The offering of consumption and retail opportunities remains characteristic of the lowest levels of urban hierarchy and does not demonstrate the existence of an insular economy. NOCGSA Reb. Ex. 6.

129. Dr. Anderson's additional qualifying criterion for finding a "community of interest" between two areas, that a "majority" of workers commute to the central city, is also unsupported by data concerning metropolitan areas in this country. In fact, at the hearing, Dr. Anderson could not name *one* major metropolitan area where over 50 percent of the outlying county residents commute to the central city. Tr. 2158. A review of 1980 Census commuting statistics also reveal how unrealistic Dr. Anderson's majority commuting criterion is. *See* Findings 117, 118.

130. The OMB includes "outlying counties" within an MSA based on consideration of the amount of commuting and population density. *See* Findings 108-111. Both criteria are contrary to Dr. Anderson's test for finding a "community of interest" between two areas. Dr. Anderson's community of interest criteria arbitrarily ignores the reasonability of the federal government's MSA designation which, by definition, groups outlying counties with central cities based on identifiable economic and social ties between the areas.

131. In trying to establish that there is no community of interest between St. Tammany Parish and Orleans, much of Dr. Anderson's exhibit testimony is built on documenting population/demographic differences between St. Tammany and Orleans Parishes. La Star Exs. 6 at 1-2; Ex. 23 at 21-22. According to Dr. Anderson "[i]t is difficult to understand how such socially, demographically, politically and economically different parishes could be considered as part of a single community of interest. La Star Ex. 23 at 21-22. However, at hearing, Dr. Anderson admitted that central cities typically differ in their population characteristics from suburban areas:

> Mr. Tollin: In your opinion, your professional opinion, is it common for central cities to be identical or similar in their characteristics to suburban area?

Dr. Anderson: No. Tr. 2164.

Dr. Anderson also agreed with Dr. Speyrer's discussion regarding urban development, and cited the "economics of the situation . . . " that "encourage more affluent people to move to [suburban] areas that are newer, have more land, where they have more control over taxes, [and] where they have more control over the services." Tr. 2164. At the hearing, Dr. Anderson further testified that population differences between central cities and suburban areas within a metropolitan areas do "not necessarily" destroy the existence of a community of interest between the areas. Tr. 2164-2165. Given the above testimony, Dr. Anderson's written remarks concerning population differences between St. Tammany and New Orleans Parishes are unpersuasive.

132. NOCGSA's Rebuttal Exhibit 6 documents, the differences between St. Tammany Parish and Orleans Parish are typical of the differences between suburban and central counties in metropolitan areas and can be attributed to the history of urban development since the 1960s. NOCGSA Reb. Ex. 6, pp. 8-13. Thus, in simple terms, the better educated, relatively affluent business and professional people who work in major cities prefer to live in suburban areas surrounding central cities like New Orleans or, for that matter, Washington, D.C., even though they have close ties to and frequently work in the central city.

133. Many of the people living in St. Tammany Parish are better educated, earn more money, and vote Republican more often then the people who live in New Orleans. *See* NOCGSA Reb. Ex. 6, pp. 5-8. The foregoing pattern also exists when comparing the residents of Washington, D.C. with the residents of Montgomery County, Maryland and Fairfax County, Virginia. *See* NOCGSA Reb. Ex. 6, pp. 9-13. In brief, as NOCGSA's Reb. Ex. 6 makes clear, the differences in population characteristics do not rule out a community of interest between St. Tammany Parish and New Orleans. Rather, such differences between central cities and suburban communities are common.

134. In its Rebuttal Exhibits 23 and 28, La Star objects to NOCGSA's Dir. Ex. 7 on several grounds. NOCGSA's Dir. Ex. 7 is the telephone survey by M/A/R/C, Inc. (M/A/R/C) of St. Tammany residents aged 18 and over. La Star asserts that the M/A/R/C survey's weighting scheme is flawed because M/A/R/C did not use the population proportions in the various age/sex categories as determined by the United States Census. Further, La Star claims that the two pages of material contained in of NOCGSA's Dir. Ex. 7C do not contain sufficient pertinent data to explain fully M/A/R/C's weighting and callback analysis. La Star also states that the response rate to the telephone survey of about 25 percent raises the question of whether the survey is seriously distorted. Dr. Anderson, who sponsored the referenced La Star rebuttal exhibits, also testified that non-responses are usually not checked when a company is conducting marketing research because of the expense involved, although such checks are normal for "scientific purposes" or when attempting to get a paper published. Tr. 2182. Although the telephone survey study might have flaws in that the study might not have included a perfect cross-section of the population of the New Orleans MSA, the random digit sampling method utilized appears to have some validity. In this light, the survey supports the theory that there is a community of interest between St. Tammany Parish and New Orleans.

Issue 5 - Operational Efficiencies

135. NOCGSA argues that because of the strong community of interest which exists between New Orleans and St. Tammany Parish, the operation of one cellular system which covers both areas will serve the needs of the public better than the operation of two separate systems. Noting that one of the most expensive elements of any cellular system is the main switch (MTSO) which costs about $500,000 at a minimum, NOCGSA observes that La Star proposes to utilize a separate switch for St Tammany Parish, whereas NOCGSA will not need to install an additional cellular telephone switch. NOCGSA Dir. Ex. 8, p. 1. NOCGSA claims that the monetary savings which will be achieved by not installing an additional switch in St. Tammany Parish are substantial and will result in providing services to St. Tammany subscribers at the same level as the prices charged by the non-wireline licensee in the New Orleans MSA, namely, Radiofone, Inc. (Radiofone). Radiofone offers area-wide service to the city of New Orleans and St. Tammany Parish from one switch. *Id.* at 2. NOCGSA argues that given the limited number of additional potential subscribers in St. Tammany Parish as compared to the entire New Orleans MSA, it would be inefficient and certainly more expensive to install a separate switch and provide a separate monitoring system and staff in St. Tammany Parish. *Id.* at 2. NOCGSA also observes that, in order to prevent calls from being dropped as customers travel from La Star's system into NOCGSA's current New Orleans system (*i.e.*, to provide "seamless" service to La Star's customers who travel into other portions of the New Orleans MSA), La Star will incur costs of interconnecting its switch to NOCGSA's switch in addition to La Star's costs of buying and installing its own main switch (MTSO) in St. Tammany Parish. *Id.* at 17. NOCGSA would not incur such costs if it operated its proposed St. Tammany cells in conjunction with its existing New Orleans cells as parts of one system. Similarly, NOCGSA notes that La Star will incur expenses in coordinating its frequencies with those of NOCGSA's existing system if La Star's proposal is granted, whereas no frequency coordination would be required if NOCGSA's expansion proposal were granted. *Id.* at 18. Further, NOCGSA explains that La Star will have to pay the costs associated with interconnecting its new cellular system with the local public landline exchange, whereas NOCGSA is already interconnected to that exchange. *Id.* at 18.

136. NOCGSA claims that one of the greatest benefits which will be experienced by St. Tammany Parish residents as a result of the operation of the North Shore system (the service area proposed by both applicants in this proceeding lies to the North of Lake Pontchartrain; hence the "North Shore system") by NOCGSA will be that the St. Tammany residents will not be "roaming" when they commute to New Orleans. Thus, since St. Tammany Parish will simply be a part of NOCGSA's New Orleans cellular system, customers will be "home" subscribers and will be able to place and receive calls anywhere within the New Orleans MSA without dialing a special access number or being subjected to generally higher rates applicable to roamers. *Id.* at 4-5. NOCGSA notes that another result of NOCGSA's serving both New

Orleans and St. Tammany Parish will be that St. Tammany Parish customers will be offered retail package pricing plans which can be used throughout the New Orleans MSA. *Id.* at 5. Further, NOCGSA asserts, as a result of NOCGSA's operation of the St. Tammany Parish cells in conjunction with the South Shore cells, NOCGSA can utilize the staff and services presently in place in New Orleans and at the Atlanta headquarters of NOCGSA's parent, BellSouth Mobility, Inc. (BMI) *Id.* at 7. NOCGSA explains that the staff it currently utilizes includes a network operations group of five people, including two field engineers, who serve as a back-up to the existing Network Service Center in Atlanta, which monitors every cell site in all of the systems operated by NOCGSA and its affiliates and is manned twenty-four hours a day, seven days a week. *Id.* at 7-8.

137. The Commission licenses two carriers for each cellular service area. NOCGSA observes that the licensees in a particular MSA must compete on a relatively equal basis if consumers are to benefit from a truly competitive market. *Id.* at 9-10. The non-wireline licensee in the New Orleans MSA is Radiofone. Radiofone currently serves most of the New Orleans MSA including St. Tammany Parish. *Id.* at 12. NOCGSA argues that facilities-based competition between licensed carriers in the New Orleans MSA cannot work effectively if one of the carriers cannot serve a major portion of the metropolitan area. *Id.* at 10. Thus, NOCGSA notes, if La Star serves only St. Tammany Parish and NOCGSA serves the remainder of the New Orleans MSA but not St. Tammany Parish, neither NOCGSA nor La Star will be able to compete effectively with Radiofone because of the close ties between St. Tammany and New Orleans and the desire of cellular customers to avoid roaming charges and to enjoy the same rates for calls made throughout the New Orleans MSA. *Id.* at 10-11. NOCGSA argues that if it is awarded the cellular license for the North Shore, it will be able to compete effectively with Radiofone and this competition will encourage both licensees to improve their product and keep prices competitive. *Id.* at 12-13 and paragraph 134, *supra*.

138. In this regard, NOCGSA asserts that since Radiofone has an established presence in Louisiana and enjoys a high degree of name recognition, Radiofone's competitor in St. Tammany will need to have a recognizable name and employ a high profile advertising campaign to make any inroads on Radiofone market share on the North Shore. *Id.* at 13. NOCGSA explains that it will operate its North Shore system under the trade name of BellSouth Mobility, the name under which it has operated its New Orleans system since 1984. *Id.* Further, NOCGSA claims, since most of the mass media provided in St. Tammany Parish originate in New Orleans (see paragraph 121, *supra*), and because advertising rates in such media are mostly based on coverage of the entire metropolitan area, it would be expensive and inefficient for La Star to advertise for St. Tammany customers over the New Orleans-based mass media. *Id.* at 14. On the other hand, if NOCGSA were to operate a cellular system serving both St. Tammany and New Orleans, it could take full advantage of area-wide mass media advertising. *Id.*

139. La Star takes issue with many of the foregoing benefits alleged by NOCGSA. First, La Star claims that since the Louisiana Public Service Commission does not regulate rates of return for cellular service, the individual cost of a cellular switch will not necessarily affect rates. Further, La Star observes that the cost of a switch is only one factor in determining the costs of operating a cellular system and since La Star's proposed rates are lower than NOCGSA's rates, the public interest is better served by La Star's lower rates. La Star Reb. Ex. 24, p. 1. La Star also asserts that NOCGSA's expansion plan provides for the transition from analog to digital service. In this light, La Star argues that NOCGSA will incur significant expenses to build more cell sites during the period of transition in order to assure adequate service for its analog customers as spectrum is taken away for digital equipment. La Star also surmises that NOCGSA will be making significant expenditures on new switching equipment. *Id.* at 2. La Star claims that it will be in a position to buy the most up-to-date switch and cell site equipment when it commences operation, but it does not commit itself to using either digital or analog equipment. *Id.* at 2-3. La Star also asserts that it and NOCGSA can make arrangements whereby customers of each of their cellular systems can be treated as being "home" customers, whichever system they use, thus eliminating the higher rates and additional access numbers for "roamers". *Id.* at 5-7. Further, La Star states that it can utilize the "yellow pages," billboards, local newspapers and local radio and direct mail to advertise its new system and therefore it need not use New Orleans-based mass media. *Id.* at 15.

Issue 2 - Geographic Area / Population Coverage

TIREM v. Carey

140. In Exhibit 1 of its Direct Case, La Star predicts the areas and populations which it and NOCGSA propose to serve by utilizing procedures consistent with Section 22.504 of the Commission's Rules and FCC Report No. R-6406, entitled "Technical Factors Affecting the Assignment of Facilities in the Domestic Public Land Mobile Radio Service," by Roger B. Carey (the Carey Report). *See* Section 22.903(c) of the Commission's rules. La Star claims that the predicted 39 dBu contours of its six-cell system encompass 1,034 square miles and 110,285 persons.[10] All of the persons to be served reside in St. Tammany Parish, Louisiana, which has a population of 110,869 according to the 1980 U.S. Census. Thus, La Star will serve 99.5 percent of the residents of St. Tammany Parish (all but 584 people in that parish). La Star Dir. Ex. 1, p. 1. In contrast, La Star asserts that the predicted 39 dBu contours of NOCGSA encompass a total population of 107,104, all of whom live in St. Tammany Parish, and a total area of 1,005 square miles. Thus, La Star predicts that NOCGSA will serve 96.6 percent of the resident population of that parish, leaving 3,765 people in that parish unserved. *Id.* at 2.

141. In its Dir. Ex. 1, La Star claims that it will provide service to 3,765 persons, representing 3.4% of the total Parish who would not be served by NOCGSA. La Star also indicates that NOCGSA would provide service to 584 persons in St. Tammany Parish who would not receive service from La Star's proposal. La Star's Dir. Ex. 1 states that La Star's "unique" service areas, considered together, have 1,249 commuting workers, 235 people with at least four years of college, and 162 households with incomes in excess of $35,000. As NOCGSA Rebuttal Exhibit 7 makes clear, however, these "pockets" served exclusively by La Star are small and relatively poor and rural in their composition, and the population is generally characterized

by low-to-moderate income levels, low educational attainment and blue-collar occupations. NOCGSA Reb. Ex. 7, p. 13. Further, the volume of traffic in these areas is low, based upon information published by the Louisiana Department of Transportation and Development. *Id.* at 12-13.[11]

142. Initially, NOCGSA submitted three exhibits concerning its predictions of the areas and populations which it proposes to serve with its four-cell system. These exhibits are Direct Exhibits 1 through 3. Dir. Ex. 1 and 2 explain why NOCGSA considers CNET, Inc.'s version of the Terrain Integrated Rough Earth Model (TIREM) method.[12] of predicting coverage to be superior to the Carey Report's methodology. Dir. Ex. 2 includes one map showing NOCGSA's predicted coverage utilizing the Carey Report's procedures and another map showing predicted coverage utilizing TIREM procedures which were enhanced by CNet, Inc. (CNet). Dir. Ex. 3 explains the manner in which the areas and populations to be served by NOCGSA were calculated and includes relevant figures. Dir. Ex. 3, p. 3 states that the Carey Report procedures indicate that NOCGSA will cover 789 square miles of St. Tammany Parish and will serve a total population of 106,996, which represents 96.51 percent of that parish. Like La Star, NOCGSA states that all of the persons to be served by its proposal reside in St. Tammany Parish. NOCGSA asserts that the CNet TIREM method indicates that NOCGSA's proposed cellular system will cover an area of about 830 square miles in St. Tammany Parish and a population of 109,345, which represents 98.6 percent of St. Tammany Parish's population, whereas La Star will cover about 845 square miles of that parish and the total population of 110,869 in that parish. NOCGSA Reb. Ex. 5, pp. 3-4.

143. With respect to NOCGSA's Dir. Exs. 1 and 2, both the Bureau and La Star objected to NOCGSA's failure to comply with the last sentence of Section 22.903(c) of the Commission's rules, in that NOCGSA failed to submit the supporting data and calculations concerning the conclusions depicted on the coverage map developed by using CNet TIREM. Since the CNet TIREM software utilized in NOCGSA's Dir. Ex. 2 is proprietary, NOCGSA asked permission to utilize the "plain vanilla" TIREM-11 software, which is in the public domain and available from the Commerce Department's National Telecommunications Information Administration (NTIA), to demonstrate the basic validity of its original showing. The Presiding Judge allowed NOCGSA to submit an exhibit demonstrating that the public domain version of TIREM-11 substantially supports the CNet map included in NOCGSA's Exhibit 2. Tr. 350-354. The Judge explained that if the new showing was a "completely different approach," the exhibit would not be accepted. Tr. 353-354. The Presiding Judge ruled that only signal strengths of 39 dBu could be relied upon in depicting reliable service areas. Tr. 204. NOCGSA explained that -95 dBm equates to 39 dBu in the instant case. Tr. 343-345.

144. NOCGSA purchased a personal computer version of TIREM-11 from NTIA which is part of NTIA's "MicroComputer Spectrum Analysis Models" (MSAM) software. CNet, Inc. (CNet) ran this latest public domain TIREM model for NOCGSA. NOCGSA Rebuttal Exhibit 35 contains a declaration under penalty of perjury by David M. Zumwalt, who is the President of CNet, and five attachments which relate to the MSAM TIREM program. The results of running the program with respect to NOCGSA's cellular system are contained at attachments 3 through 5. Attachment 4 to that exhibit contains tabular listings of the MSAM results run by CNET for the La Star and NOCGSA systems. As Mr. Zumwalt explains in his declaration, an MSAM TIREM analysis was performed for points five, seven, nine and eleven miles from each base station along radials extending every fifteen degrees, resulting in the collection of 96 sample points per site, for a total of 960 points. NOCGSA Reb. Ex. 35, p. 3. The MSAM software was used for the sole purpose of calculating the path loss between each base station and possible receiver locations. *Id.*, at 4 and Tr. 1687-1688.

145. Certain factors other than those used to calculate path loss, which were contained in the MSAM software and which Mr. Zumwalt defines as "additional factors," were not used to compute signal strength. Mr. Zumwalt's declaration explains that those additional factors, which include input power, antenna radiating patterns, receiver characteristics and other communication line factors, were "appropriately and *consistently* applied to the CNET TIREM and MSAM TIREM path loss results" in generating the plots (or maps) of the applicant's signal strengths submitted as attachment 5 to the exhibit. NOCGSA Reb. Ex. 35, p. 4. In simple terms, CNET utilized engineering material in the applications of NOCGSA and La Star to determine effective radiated power (ERP) for each antenna and subtracted the path loss from the ERP to determine the signal strength for each point analyzed.[13] NOCGSA's exhibit contains two plots (maps), one each for the NOCGSA and La Star systems, and each plot (map) depicts the -95 dBm contours (39 dBu contours) as projected by the CNet TIREM and the MSAM software.

146. In its Rebuttal Exhibit 25, La Star makes two objections to NOCGSA Reb. Ex. 35. First, La Star notes that NOCGSA, in calculating path loss with the MSAM software, used a value of 1.0 for the earth's permittivity, in place of the default value of the program, which is 15.0. La Star Reb. Ex. 25, p. 4. In this regard, permittivity is the "insulating ability of a substance." Tr. 1705. Although Mr. Zumwalt agreed with La Star's observation on this matter, he also explained that permittivity is a relatively unimportant factor in determining the propagation of signals for the frequencies involved. Tr. 1736-1737. Mr. Zumwalt stated that CNet ran some of the points included in the MSAM software using a permittivity value of 15 and the maximum difference in path loss was in the range of 0.09 dB. Tr. 1736. Mr. Zumwalt concluded that using the value of 1.0 for permittivity did not "materially affect the results of the study that we performed." *Id.* The Bureau concurs in this conclusion.

147. Second, La Star asserted that it appeared there might be errors in the signal strengths contained in NOCGSA's Reb. Ex. 35 if NOCGSA used a dipole antenna when quantifying the effective radiated power (ERP) which was "supplied to the public-domain TIREM computer runs," because the program gave results on the assumption that an isotropic antenna was used. La Star Reb. Ex. 25, pp. 4-5. The Bureau notes, however, in its Findings, that since the MSAM TIREM program was used solely to calculate path loss, and not actual field strength, the values of input power and antenna gains which were entered into this program, whether referenced to a 1/2 wave dipole antenna or an isotropic antenna, are not relevant because the MSAM program does not use those inputs to calculate path loss. *See* Bureau Finding 10.

148. La Star appears to agree with NOCGSA that the path losses shown in NOCGSA Reb. Ex. 35 are accurate, to the extent that La Star's testing of the same input data as were used to NOCGSA in its use of the MSAM TIREM software (and as supplied by NOCGSA to La Star) revealed the same results. Tr. 1785-1986. The Bureau states, in its Findings, that NOCGSA should have made a more orderly and detailed presentation of the data other than path loss data which it used to determine signal strength, including a few sample calculations, instead of merely depicting the signal strength on its plots (maps). Nevertheless, it appears that the relevant engineering data is contained in the applications which are part of the record in this case. The Bureau's sample testing of the path loss and signal strengths contained in NOCGSA's Reb. Ex. 35 indicates that, with certain exceptions, NOCGSA's exhibit is generally accurate and generally substantiates the data contained in NOCGSA's Dir. Exs. 2 and 3 concerning the areas and populations to be served by NOCGSA using the CNet TIREM methodology. *See* Bureau Finding 11.

149. Mr. Zumwalt testified that two of the advantages of TIREM over the use of the Carey Report procedures are that TIREM considers the adverse effects of vegetation and building clutter. Tr. 1740-1741. These two potential advantages have no relevance to this proceeding, because CNet did not use vegetation or building factors in running the MSAM TIREM program, the results of which are contained in NOCGSA Reb. Ex. 35. Tr. 1616, 1741-1742. Nevertheless, Mr. Zumwalt stated that the MSAM TIREM methodology is superior to the Carey Report methodology in this case because TIREM examines more points than Carey and because TIREM utilizes terrain data throughout the study area, not just the area between two and ten miles from the transmitter. Tr 1737-1738. Mr. Zumwalt also testified that TIREM would more accurately predict coverage areas than Carey in rough or mountainous terrain, whereas the improved accuracy would be less in the terrain involved in this case. *Id*. Nevertheless, Mr. Zumwalt claimed that there was "tremendous variation in signal" caused by even moderate changes in terrain and the terrain in question is not entirely flat. Tr. 1738.

Demand/System Expansion/Comparative Issues 2 & 4
Demand for Service and Coordination of System Design

NOCGSA

150. NOCGSA, the wireline licensee in the New Orleans MSA, seeks to expand its existing cellular system to include service to St. Tammany Parish. NOCGSA Dir. Ex. 4 at 3. NOCGSA proposes to construct and place in operation a four-cell cellular system. Full service to roamers will also be offered.

151. NOCGSA based its engineering design for its proposed four-cell system on service demand projections for St. Tammany Parish. NOCGSA Dir. Ex. 4. Each proposed based station, or cell (sites MYY, N, Q and X) of the NOCGSA system is designed to meet a specific demand objective identified in St. Tammany Parish:

Slidell Cell Site - The Slidell area is the most heavily populated region in St. Tammany Parish. Several major interstate, state and federal highways intersect in Slidell, including I-12, I-10 and State Route 59. The Slidell site (site MYY (004)) was selected in order to connect New Orleans with Mandeville to the west, and Bogalusa, Louisiana to the north, and to accommodate roamer traffic from the Gulfport/Biloxi MSA to the east. NOCGSA Dir. Ex. 4 at 15. NOCGSA has a roaming agreement with the cellular operator in Gulfport/Biloxi which will permit St. Tammany customers to automatically roam on that system. NOCGSA Dir. Ex. 4, Attachment B4.

Mandeville Cell Site - The Mandeville site (site N (005)) was positioned to provide coverage to the second most populated area in St. Tammany, the major highways in and around Mandeville and, in particular, the Causeway leading to New Orleans. Coverage from this site in conjunction with coverage from NOCGSA's sites on the south shore provide continuous coverage over the entire 24-mile length of the Causeway connecting St. Tammany Parish with the remaining portion of the New Orleans MSA. NOCGSA Dir. Ex. 4 at 15.

Covington Cell Site - As proposed, the Covington cell site (site Q) has a *de minimis* extension into Louisiana RSA No. 7 (Hammond, Louisiana). Service in that RSA will be offered by a partnership of which NOCGSA's parent, BMI, is the managing general partner. Both the St. Tammany portion of NOCGSA's cellular system and the Louisiana RSA No. 7 system will operate off of NOCGSA's New Orleans cellular switch. Site Q will have overlapping coverage on I-20 with the Hammond RSA cell, providing continuous coverage from St. Tammany Parish, through Tangipahoa Parish and into Livingston Parish in the Baton Rouge CGSA. NOCGSA Dir. Ex. 4 at 15-16.

Talisheek Cell Site - NOCGSA's Talisheek cell site (site X) will complete coverage to the St. Tammany Parish population where demand for cellular service exists and allow uninterrupted service to traffic traveling State Routes 21 and 42. NOCGSA Dir. Ex. 4 at 16.

152. In 1983, Advanced Mobile Phone Service, Inc. (AMPS), predecessor to NOCGSA,[14] proposed to expand its existing cellular system operating in the southern portion of the New Orleans MSA to provide "service to the communities, and surrounding areas, of Covington, Mandeville, and Slidell, Louisiana -- the largest communities in St. Tammany Parish" and the areas most likely to have high demand for cellular service. NOCGSA Dir. Ex. 4 at 3.

153. When AMPS filed its expansion application in 1983 proposing service to St. Tammany Parish, it used the *Rand McNally Commercial Atlas and Marketing Guide* as its initial guideline to define the CGSA. It adjusted the Ranally Metropolitan Area (RMA) (used by Rand McNally to define statistical areas) to account for "the impact of vehicular traffic patterns using state and county traffic flow maps, population density within the metropolitan area and its adjacent communities as well as present and future land use on a local and regional basis." NOCGSA Dir. Ex. 4, 1983 Exp. App., Att. 1B, Ex. 12 at 1.

154. AMPS's demand forecasts for its 1983 expansion application were estimated, in part, using marketing results from the Chicago Developmental Cellular System. AMPS adjusted the Chicago study results to allow for competition in the St. Tammany Parish. NOCGSA Dir. Ex. 4, 1983 Exp. App., Att. 1B, Ex. 12 at 2-3.

155. On October, 1987 NOCGSA filed an amendment to the AMPS expansion application, proposing to add a fourth cell location (site X) in the Talisheek area in order to complete "coverage to remaining transportation arteries and developing communities in St. Tammany Parish." NOCGSA Dir. Ex. 4, 1987 Amendment, Att. 1E, Ex. 2 at 1. Specifically, "to provide maximum coverage to State Routes 21 and 41, which are major transportation routes to and from the northeastern portion of St. Tammany Parish." NOCGSA Dir. Ex. 4, 1987 Amendment, Att. 1E, Ex. 1 at 1.

156. In preparing the 1987 amendment to its expansion application, NOCGSA studied information concerning the New Orleans MSA, including information regarding population density and vehicular traffic flow data. NOCGSA used the 1987 *Rand McNally Commercial Atlas and Marketing Guide* and studies conducted for NOCGSA by Urban Decision Systems, Inc., concerning population and vehicular traffic flow, to determine the location of the proposed Talisheek cell site. NOCGSA relied upon its engineering plan to "construct|| a network which could be expanded over time to accommodate the rapid population growth in the northern area of the MSA." NOCGSA Dir. Ex. 4, 1987 Amendment, Att. 1E, Ex. 7 at 1. NOCGSA explained that:

> the logical evolution of the system in response to changing service demands has been and remains to be of the utmost importance as exemplified by Applicant's August, 1983 filing || requesting the addition of Locations N and MYY, fine tuning of the system correcting service deficiencies . . . and the subsequent filing for the addition of Location Q filed with the Commission September 3, 1987. NOCGSA Dir. Ex. 4, 1987 Amendment, Att. 1E, Ex. 2 at 1.

La Star

157. In September, 1983, La Star filed a mutually exclusive application to the original AMPS expansion application proposing a new system to serve St. Tammany Parish in the New Orleans MSA. In that application, La Star proposed a six-cell system to serve St. Tammany. *See* La Star 1983 Application. In 1987, when La Star amended its original application it continued to propose a six-cell system and made certain adjustments to account for changes in cell site locations. La Star 1987 Amendment, Ex. E at 1.

158. John Brady, President of SJI Cellular and Chairman of La Star's Management Committee, testified that he "laid out the parameters under which the engineers would design [La Star's six-cell] system." La Star Ex. 5 at 3. He claimed that the system was designed using six cells at his "insistence." La Star Ex. 12, Brady Declaration at 3, 12; Brady Deposition at 108. His design idea was obtained without consulting any demographic expert -- not even La Star's own consultant, Dr. Anderson. Tr. 892. He also testified initially that his design was population based. Tr. 886. Subsequently, he stated that La Star's system, which covers virtually the entire Parish and does not restrict itself to the population centers, was both population and geographically based. Tr. 889-890. Brady was also unaware of the fact that two of the proposed La Star cells would provide service to less than 50 people in the first year of operation. Tr. 887-888. Brady stated that the purpose of the six-cell system was to propose a "better system than BellSouth Mobility" and "to commit the 49 percent venturer to what [Brady] considered a long range system and not a short range system." Brady Deposition at 108; La Star Ex. 12 at 3 (Brady Declaration).

159. La Star did submit a demand study prepared by Dr. Anderson (and NERA). However, this study was not St. Tammany-specific and was based on a demand projection model developed for other markets. Tr. 2135-2136. In its direct case filing, La Star explains that its "Demand Study provides details concerning the methods applied by market demand experts to project cellular demand. La Star then distributed the aggregate demand for the first five years across its cell layout with respect to population." La Star Ex. 3 at 1. Specifically, after obtaining NERA's demand projections, La Star:

> drew proposed cell sites on maps obtained from the U.S. Geological Survey, and *then* located all cities within the area to be provided with cellular service. La Star *then* determined the total population who could receive cellular services from La Star's proposed system, as well as the population of each cell. From these population figures . . . La Star calculated the distribution of the population on a cell by cell basis for its proposed system. La Star 1983 Application, Ex. L-8 at 6 (emphasis added). *See also* La Star 1987 Amendment, Ex. L-8 at 2; Anderson Tr. at 2145.

160. In 1986, MobileTel, Inc., a wholly-owned subsidiary of SJI, Inc., filed a cellular application in the Houma-Thibodaux MSA in Louisiana. Tr. 893. The Houma-Thibodaux MSA is approximately three times the size of St. Tammany Parish and has approximately 50,000-60,000 more people. Tr. 894. In its initial application, MobileTel proposed to serve the Houma-Thibodaux MSA with a single cell; Tr. 896, this application design was population based. Tr. 897. After grant, the initial one-cell design was modified to add additional cells. Tr. 900.

161. Drs. James Wright and Andy Anderson of New England Research Associates (NERA), in Amherst, Massachusetts were hired by Maxcell Telecom -- the minority interest holder in La Star's minority partner in 1983 (Tr. 2134-2135) - to prepare La Star's original demand estimates for its application to serve St. Tammany Parish. Tr. 2132-2134, 2141. *See also* La Star 1987 Amendment, Ex. L-8 at 2. Dr. Anderson prepared the statistical analysis for the La Star demand estimates. Tr. 2135.

162. In its direct case filing, La Star proffered La Star Exhibit 2 entitled "*Demand Study*," sponsored by Dr. Andy B. Anderson and dated September 12, 1990. La Star Ex. 2, Anderson Declaration at 4. In his Declaration, Dr. Anderson states that in 1983, he and Dr. James Wright "performed demographic analysis of St. Tammany Parish and related the analysis to the demand of cellular service." La Star Ex. 2, Anderson Declaration at 1. However, Dr. Anderson testified that he did not do a separate survey of demand for St. Tammany, but rather used an

estimation model NERA had developed based on "other people's surveys that had been done on the top 30 or 40 [cellular] markets." Tr. 2135-2136.

163. NERA used its prediction model to prepare demand estimates for "hundreds" of markets at a time. Tr. 2135. With NERA's model, Dr. Anderson testified, it was possible to prepare 100 demand estimates in "an afternoon." Tr. 2135. Dr. Anderson characterized the La Star work as:

> a fairly small project at the time because all it required . . . was to take the new cities, put in the variables that predicted demand, [and] get the numbers. Sometimes we didn't even have to look at them to see if anything was out of order. We just put them in the mail and sent them off. Tr. 2137.

164. In preparing the La Star demand figures, Dr. Anderson examined some St. Tammany commuting data. He never visited St. Tammany Parish, nor did he survey the area in connection with his work for La Star. Tr. 2137, 2141, 2145. He could not identify SJI Cellular, Inc., the majority partner of La Star, and he never spoke to any SJI representative on the La Star Management Committee. Tr. 2137.

Ability To Accommodate Anticipated Demand

NOCGSA

165. NOCGSA designed the St. Tammany portion of its cellular system "to use all the voice radio channels allocated" to the Block B frequency. NOCGSA Dir. Ex. 4, Attachment 1E, Exhibit 3 at 1. NOCGSA's system design will provide "for orderly evolution into a highly efficient small-cell configuration capable of handling large numbers of customers within the allocated spectrum." NOCGSA Dir. Ex. 4, 1987 Amendment, Att. 1E, Ex. 3 at 1. NOCGSA expects to place its four-cell system in operation within six months of Commission authorization. NOCGSA Dir. Ex. 4 at 17.

166. NOCGSA's proposed system (cell sites MYY, N, Q, and X) form a cellular configuration of base station transmitters and receivers which provide virtually Parish-wide coverage. NOCGSA Dir. Ex. 4 at 12. Base stations will be connected through NOCGSA's New Orleans switch by means of wireline facilities or microwave control circuits, and the radio system will be fully interconnected with the public landline telephone network. NOCGSA Dir. Ex. 4 at 12-13. NOCGSA's antenna configuration enables NOCGSA to determine the sector origin of all mobile traffic, which will provide statistical data useful for planning system expansion and later modifications to meet demand. NOCGSA Dir. Ex. 4 at 13.

167. Within each cell of the NOCGSA proposed system, cellular radio channels will be trunked and, within the system, frequency reuse will be employed to achieve spectrum efficiency. NOCGSA Dir. Ex. 4 at 13. NOCGSA designed its frequency plan for the St. Tammany Parish portion of its system to avoid intra-system interference and to allow coordination with neighboring systems. NOCGSA Dir. Ex. 4 at 24.

168. NOCGSA intends to operate the proposed St. Tammany cells as part of an integrated system with its cellular operations serving the remainder of the New Orleans MSA, thus, no intersystem frequency coordination will be required within the MSA. NOCGSA Dir. Ex. 4, 1987 Amendment, Att. 1E, Ex. 1 at 1. NOCGSA has coordinated, or will coordinate, with adjacent markets as required.

169. The circuit requirements proposed for sites MYY, N, Q and X of the NOCGSA system are based on current marketing forecasts and usage projections. NOCGSA Dir. Ex. 4 at 14. Initial circuit requirements assume that each subscriber will produce a load of 0.26 Erlangs during busy hours. NOCGSA Dir. Ex. 4, 1987 Amendment, Att. 1E, Ex. 2 at 1. The forecasts for conversation circuits for the Slidell cell are 27 circuits in 1991 and 61 in 1995, and for the Mandeville cell, 24 circuits in 1991 and 55 in 1995. Present forecasts for cell Q are 15 circuits in 1991 and 34 in 1995. Present forecasts for cell X are 9 circuits in 1991 and 21 in 1995. NOCGSA Dir. Ex. 4 at 17-18. NOCGSA will take traffic measurements on a routine basis and system improvements will be implemented as required. Additional channels will be added to cells where traffic measurements indicate that the system design objective of a P.02 (2% blocking) grade of service will be exceeded. NOCGSA Dir. Ex. 4 at 14.

170. The NOCGSA cellular system uses sixty-degree sector-receive antennas at each site. These antennas provide more gain (17 dB) than omni-directional transmit antennas (10dB) and provide other advanced functions. NOCGSA Dir. Ex. 4 at 13. Among other advantages, this antenna configuration enables NOCGSA to determine the section of origin of all mobile traffic, which will allow NOCGSA to plan system expansion and modifications, as demand warrants.

171. NOCGSA designed the St. Tammany portion of its cellular system to reuse all available voice channels in a manner that minimizes interference between cell sites by utilizing co-channel frequencies. Cells are arranged in a hexagonal grid pattern, separated into operating groups of seven cells each. The relationship of the distance between the centers of neighboring cells, to the radius of the cell, establishes the reuse ratio. NOCGSA used a frequency reuse ratio of 4.6 to establish the optimum number of cells per group. NOCGSA Dir. Ex. 4 at 24. NOCGSA's assignment of specific frequency sets to a cell will allow it to accommodate additional subscribers by systematically adding non-interfering frequency sets in accordance with its plan for future system expansion. NOCGSA Dir. Ex. 4 at 13-14.

172. Based on a frequency reuse ratio of 4.6, individual cells in the seven cell group are assigned independent channel sets. Cells which are separated by less than the minimum allowable reuse distances are assigned different channels. This frequency reuse plan may be implemented as many times as needed to cover the desired area. NOCGSA Dir. Ex. 4 at 25.

173. NOCGSA's proposed system for St. Tammany Parish will accommodate the lower-powered portable phones and utilize the additional 10 MHz of spectrum made available to cellular by the Commission in 1986. NOCGSA Dir. Ex. 4 at 18-19.

174. NOCGSA is in the process of upgrading the equipment in its south shore sites. NOCGSA will replace its present HDI radio frames with new HDII frames. NOCGSA Reb. Ex. 4 at 5. The new HDII frames will allow NOCGSA to implement use of the additional 10 MHz of spectrum. Since not all mobile equipment will be capable of utilizing the full 832 channels of spectrum now available, the system switch will assign channels from the

additional spectrum only to those mobiles equipped for the additional spectrum. NOCGSA Reb. Ex. 4 at 6. NOCGSA intends to install the new HDII equipment in the St. Tammany sites upon grant of permanent operating authority. NOCGSA Dir. Ex. 4 at 6-7.

La Star

175. La Star designed its six-cell system and "then distributed the aggregate demand for the first five years across its cell layout with respect to population. Based on these figures, La Star's engineer's . . . assigned certain numbers of frequencies to each cell site accommodate local and roamer demand. La Star Ex. 3 at 1. Summarized below is La Star's frequency assignment for its six-cell system for the first year of operation. These frequency channel assignments are intended by La Star to meet demand for both local and roamer services. La Star Ex. 3 at 3.

Cell Site 001 - La Star intends to assign 9 voice frequencies to Cell No. 001 (Salt Bayou) positioned over the Slidell area -- the most heavily populated area in St. Tammany and crossroads for I-12, I-10, and I-59. The maximum subscriber demand that this site can accommodate is 164 potential subscribers. First year projected subscriber demand for this cell is 177 subscribers.

Cell Site 002 - For cell site No. 002 (Pearl River) La Star proposes 9 voice frequencies with a maximum capacity to serve 164 subscribers at a time. Subscriber demand is expected to reach 165.

Cell Site 003 - There are 6 voice frequencies proposed for Cell Site No. 003 (Lacombe) positioned over Lacombe and Mandeville. Mandeville represents the second most populated region in St. Tammany Parish. Maximum capacity for this cell site is 85 subscribers. La Star projects demand to be 76 subscribers. During the second year of operation, La Star expects subscriber demand to outstrip capacity at this site -- No of Channels: 8; Subscriber Capacity: 136; Projected Demand: 137.

Cell Site 004 - Cell Site 4 (Abita Springs) is positioned over the northeastern portion of the Parish. At the outer fringes of this cell's reliable service area are the communities of Mandeville and Covington. La Star proposes 7 voice channels with a maximum capacity to serve 112 subscribers. La Star projects demand to reach 101 subscribers.

Cell Site 005 - Cell Site 5 (Madisonville) is located in the southwestern part of the Parish. The reliable service contour for this site covers the community of Covington. Covington is the third most popular area and seat of government for St. Tammany Parish. La Star proposes to assign 5 voice channels to this site with a maximum capacity to serve 58 subscribers. La Star projects capacity to be 57 subscribers.

Cell Site 006 - Cell Site 006 (Folsom) is located in the northwestern portion of the Parish. La Star projects subscriber demand to be 57 and has assigned 5 channels with a capacity to meet demand for 58 subscribers. La Star Ex. 3 at 2; *see also* La Star 1 Appendix A- Map Figure 1.

In its direct case La Star admits that certain of its cells (Cells 001 and 002 above) cannot meet projected demand. When this happens La Star relies on overlap with adjacent cells to meet demand. La Star Ex. 3 at 2.

176. Cells in La Star's six-cell system are laid out in such an "order to approach the 'gridlike' scheme" for channel assignment and reuse. La Star Ex. 3 at 3. La Star proposes an omnidirectional frequency assignment in a twelve-cell plan. La Star Ex. 3 at 4. It will use a 6.0 frequency reuse ratio - distance between cell centers to the radius of the cell. La Star Ex. 3 at 5. La Star will be required to coordinate frequency use -- to minimize intersystem interference and frequency use restrictions -- with NOCGSA in the southern portion of the New Orleans MSA and with adjacent MSA and RSA markets. La Star Ex. 3 at 4.

System Expansion To Meet Increasing Demand

NOCGSA

177. NOCGSA will further expand its cellular operations in St. Tammany Parish as customer demand warrants. NOCGSA's planned positioning of cells allows for future expansion of coverage and placement of intermediate cells to improve initial coverage and to handle increased call volume. NOCGSA Ex. 4 at 16. Changes in volume of cell traffic, as well as distribution of traffic, form the basis for forecasting the addition of the number of radios to a cell. NOCGSA Dir. Ex. 4 at 17. NOCGSA will add additional channels to those cells where traffic loads begin to approach design limits. *See* Findings at ¶ 169. NOCGSA will coordinate radio, traffic, and equipment engineering plans to achieve system growth without service interruptions. NOCGSA Dir. Ex. 4, 1987 Amendment, Att 1E, Ex. 3 at 1.

178. NOCGSA intends to provide for the transition from analog to digital cellular service in the St. Tammany area. Implementation of digital equipment will triple system capacity. NOCGSA Dir. Ex. 4 at 19. As discussed in Findings 174, the new HDII radio frames planned for initial system turn-on in St. Tammany Parish are capable of supporting digital equipment and will also facilitate use of the additional 10 MHz cellular allocation.

179. NOCGSA anticipates implementing the use of digital technology in stages and phasing out analog transmitters accordingly. The St. Tammany portion of NOCGSA's cellular system will share a common switch with its system operating in the southern part of the New Orleans MSA. *See* Findings at ¶ 168. The system switch will recognize whether the mobile units are analog or digital and will assign an available channel accordingly. NOCGSA Dir. Ex. 4 at 5-6.

180. When forecasts developed from traffic measurements indicate that the St. Tammany Parish system design objectives for blocking will be exceeded, *See* Findings at ¶¶ 167-168, 169-170, 172, cell-splitting is one option available to increase capacity to meet growing demand. This process will create new smaller cells within the original larger cells, and will permit closer reuse of frequencies. NOCGSA Dir. Ex. 4, 1987 Amendment, Att. 1E, Ex. 3 at 1. While the proposed system is capable of cell splitting, NOCGSA does not anticipate that it will be required within the current planning period, due to its cell place-

ment, proposed frequency reuse plan and planned introduction of digital equipment. NOCGSA Dir. Ex. 4 at 14. *See* Findings at ¶¶ 165-166.

La Star

181. In its direct case filing, La Star discusses several expansion plans "which are standard to the cellular industry" without committing to any particular plan. La Star Ex. 4 at 1. The expansion options La Star references includes among others, converting from an omni to sectorized cell structure, adding frequencies, and cell splitting. These expansion options require coordination within the New Orleans MSA, specifically with NOCGSA's South Shore system, and with adjacent MSA and RSA systems. La Star Ex. 4 at 3-6.

Service to Roamers

NOCGSA

182. NOCGSA's system proposal is designed to accommodate both roamers who travel to St. Tammany Parish and St. Tammany Parish customers who travel to other areas. NOCGSA Dir. Ex. 4 at 19. NOCGSA will "provide local subscribers and roamers with the ability to place and receive calls within the defined CGSA on a 24 hours per day, 7 days per week basis." NOCGSA Dir. Ex. 4, 1987 Amendment, Att. 1E, Ex. 4 at 1.

183. NOCGSA will operate its cellular telephone system from a single switch which links St. Tammany cell sites with its cell sites in New Orleans. NOCGSA Dir. Ex. 4 at 20; Findings at ¶ 166. Thus, St. Tammany Parish customers will be home subscribers within the entire New Orleans MSA. As home subscribers, these customers will not be subject to daily access rates or roamer fees when traveling between St. Tammany Parish and New Orleans. NOCGSA Dir. Ex. 4 at 20-21.

184. As of June 12, 1990, NOCGSA has roaming agreements with 77 cellular service providers outside of St. Tammany Parish. NOCGSA Dir. Ex. 4 at 19. *See also* NOCGSA Dir. Ex. 4, Attachment B4. NOCGSA subscribers will automatically have the ability to use their cellular telephones in these cellular service areas. Non-St. Tammany Parish residents (Roamers) who live in one of the 77 cellular service areas will automatically be able to use their cellular telephones while traveling in St. Tammany Parish. NOCGSA Dir. Ex. 4 at 20.

185. Through its parent, BMI, NOCGSA has reciprocal roaming agreements with carriers in the United States, Canada, and the Dominican Republic and the Bahamas. These agreements provide for automatic roaming in 526 systems which cover over 600 cities and towns. NOCGSA Dir. Ex. 4 at 20; NOCGSA Dir. Ex. 4, Attachment B4. A number of these agreements allow NOCGSA's customers to roam on either the wireline (block B) or non-wireline (block A) system. NOCGSA Dir. Ex. 4 at 21. Non-automatic credit card roaming would be available to roamers in St. Tammany from carriers which have not entered into roaming agreements with NOCGSA. NOCGSA Dir. Ex. 4 at 20.

186. Roamers on NOCGSA's St. Tammany Parish system will receive current roaming information, such as rates, service areas, access numbers and dialing patterns through NOCGSA's Customer Service Representatives. NOCGSA Dir. Ex. 4 at 21-22. In addition, a Roaming Guide is published four times a year and would be made available to NOCGSA's St. Tammany Parish customers. NOCGSA Dir. Ex. 4 at 21.

187. NOCGSA's parent, BMI, maintains a roaming department that is staffed from 7:30 a.m. to 7:30 p.m., six days a week to answer questions and handle roaming problems. This service is available to customers of any of NOCGSA's affiliates (and will be available to St Tammany Parish subscribers) and customers of other cellular carriers. NOCGSA Dir. Ex. 4 at 20-21.

188. NOCGSA also proposes to offer the following roaming services:

FOLLOW ME ROAMING SERVICE - Follow Me Roaming Service allows NOCGSA's customers inbound calls to "follow" them whenever they travel to one of the 337 participating cellular service areas. Once a three-digit code is entered, calls made to a roamer's home mobile number are automatically routed to the system in which the roamer is travelling. This service makes access codes unnecessary, thus simplifying the process for others to reach NOCGSA's customers when they travel.

ROAMER INFORMATION LINE - NOCGSA will introduce a Roamer Information Line which will allow NOCGSA's customers to dial a four-digit code while roaming in any BMI market and access to recording which will tell them how to place and receive calls in that or any of the 526 cellular service areas in which NOCGSA has roaming agreements.

ROAMER NOTIFICATION - NOCGSA will introduce a new service which will automatically call roamers entering the St. Tammany Parish system area, to welcome them to NOCGSA's system and provide them with roaming information. This informational call will be at no charge to roamers. NOCGSA Dir. Ex. 4 at 22-23.

La Star

189. La Star intends to provide roamer service to "permanent subscribers of another system." La Star 1987 Amendment, Ex. L-3 at 2. La Star proposes to offer "levels" of roaming service "depending on the business relationship between La Star and the cellular system to which the roamer subscribes." La Star 1983 Application, Ex. L-6 at 9.

Service Proposals (Comparative Issue 3)

Rates

NOCGSA

190. Cellular mobile telephone service in Louisiana is regulated by the Louisiana Public Service Commission. Tariffs setting forth the rules, regulations, rates, and maximum charges governing the provision of cellular service are required. NOCGSA Dir. Ex. 5 at 3.

191. NOCGSA included in its direct affirmative case both the retail Tariff and associated Price List for the cellular services marketed by BMI. NOCGSA Dir. Ex. 5 at 3-5, Attachment 2. The BMI New Orleans tariff contains not only basic service charges, access charges and

usage rate information, but also includes other specialized service plans, including Low, Medium, High and Super Use, and Premium Plus plans available to NOCGSA customers. NOCGSA Dir. Ex. 5 at 4-5.

192. The maximum allowable rates and charges expressed in Section 4.2 and 4.5 of the Tariff are as follows:

The minimum service period is one month	
Service establishment charge per access number	$30.00
General Service charges	$30.00
Access charge per number	$35.00 (per months)
Usage rate per minute	$ .35

The Price List describes in detail certain specialized plans including Low, Medium, High, Super, and Premium Plus Plans as well as the following optional features:

Detailed Usage Billing

Call Restrictions

Call Forwarding

No Answer Transfer

Call Waiting

Three Party Conferencing

Mobile Memo Service (a registered trademark of BellSouth Corporation)

The specific rates and charges for the specialized plans and optional services are generally lower than the maximum tariff prices and are contained in Section 4.2 and 4.5 of the Price List. NOCGSA Dir. Ex. 5, Attachment 2.

193. The roamer service charges set forth in Section 4.4 of the tariff will not *apply* to NOCGSA's St. Tammany customers, since the St. Tammany system will not be a separate system, and St. Tammany customers will be "home customers" of the NOCGSA New Orleans system. Roamer charges would only apply to service provided to NOCGSA's customers roaming *outside* the New Orleans MSA. NOCGSA Dir. Ex 5, attachment 2.

La Star

194. La Star's schedule of proposed charges is contained in La Star Ex. 10. According to La Star, it:

> intends to offer a rate schedule for its cellular system which allocates costs to subscribers according to the services used. By requiring each subscriber to pay his or her allocable share of incurred costs, La Star will make cellular service available to the greatest number of potential subscribers. La Star will not restrict the resale or shared use of its cellular service. La Star Ex. 10 at 1.

195. La Star states that its proposed rate structure was designed with "three goals in mind:"

> (1) to provide La Star with revenue sufficient to meet the costs of operations; (2) to encourage use of the cellular system by its subscribers; and (3) to recover costs during operation at full system capacity plus a return on costs incurred during system start-up. La Star Ex. 10 at 1.

La Star further states that it has proposed "a cost-based schedule of charges", La Star Ex. 10 at 1, and specifies the following rate schedule:

Proposed Rates

Number of Units Subscribed to	Monthly Access Charge/Unit
1 to 10	$33.00
10 to 20	$25.00
10 or more	$20.00

Usage Charge Per Minute

6:00 a.m. - 7:59 p.m. Monday - Friday	$0.30
8:00 p.m. - 5:59 a.m. Monday - Friday All Day Saturday, Sunday and Holidays	$0.15

One-Time Charges

Service Order Charge	$25.00 La Star Ex. 10 at 2.

196. La Star also states that it will provide temporary service to roamers, but no specific rate information is provided. La Star Ex. 10 at 2-3.

197. No back-up information was supplied to substantiate the La Star rate schedule. Further, important portions of the text of La Star Ex. 10 are identical to the "*Schedule of Proposed Charges*" contained in the 1983 Baton Rouge cellular application prepared by Maxcell. SJI played no role in its preparation. Rather, it was developed by the earlier ineligible partner in La Star - Maxcell.[15]

198. In language substantially identical to La Star Ex. 10, the Baton Rouge application states:

> Star intends to offer a rate schedule for its cellular system which allocates the system costs to subscribers according to the services used. By requiring each subscriber to pay his or her allocable share of incurred costs, Star will make cellular service available to the greatest number of potential subscribers. To make this service widely available, Star will not restrict the resale or shared use of its cellular service. NOCGSA Reb. Ex. 12, Ex. L-3 at 1.

199. Again, in language substantially identical to La Star Ex. 10, the Baton Rouge filing also states that:

> Star's proposed rate structure has been designed with three goals in mind: (1) to provide Star with revenue sufficient to meet the costs of operations; (2) to encourage efficient use of the cellular system by its subscribers; and (3) to recover costs during operation at full system capacity plus a return on costs incurred during system start-up. These goals

are served by a cost-based tariff that will encourage full utilization of the wide range of the cellular system's capabilities. NOCGSA Reb. Ex. 12, Ex. L-3 at 1.

200. Like the La Star application, the Baton Rouge application proposed cost-based rates and a usage sensitive rate schedule, again, "consisting of a low access charge plus a charge per minute of airtime." NOCGSA Reb. Ex. 12, Ex. L-3 at 1. Even the rate schedule itself was identically structured:

Proposed Rates

Number of Units Subscribed to	Monthly Access Charge/Unit
1 to 49	[Deleted. The proposed rates themselves differ although La Star's original 1983 application contained rates that were nearly identical to the rates contained in the 1983 Baton Rouge application.]
50 or	

Usage Charge Per Minute

6:00 a.m. - 7:59 p.m.
Monday - Friday
8:00 p.m. - 5:59 a.m.
Monday - Friday
Weekends and Holidays

One-Time Charges

Service Order Charge

201. Mark Krohse, USCC Accounting Manager, prepared the proposed rates. Krohse testified that he also supplied the rate schedule for La Star's October 1987 amendment. The proposed rates are not cost-based. Krohse testified that La Star's proposed rates were based on a review of a book maintained by USCC which listed cellular rates for operational cellular systems throughout the United States. Tr. 1552-1553; NOCGSA Reb. Ex. 9, Krohse (G) at 54. Brady, who is a co-sponsor with Krohse of the rate exhibit, testified that he did not know who developed the rate schedule or how the rates had been calculated. Tr. 1001-1002.

Services

NOCGSA

202. NOCGSA proposes the following services for St. Tammany Parish:

Follow Me Roaming Service
Mobile Memo Service
Custom Calling Features
Detailed Billing
Mobility Watch Program
Toll-Free Coverage
Choice of Mobile Telephone Exchanges
24-Month Billed with Service Program
Preferred Customer Program
Quarterly Connection Newsletter
Cellular Link Service

Detailed information concerning NOCGSA's service offerings was contained in Dir. Ex. 5. NOCGSA Ex. 5 at 6-12.

La Star

203. La Star proposes "to offer a wide range of innovative cellular services to the public." It also intends to "continually update and modernize its service offerings in accordance with state-of-the-art improvements." La Star Ex. 9 at 7. La Star lists the following services for St. Tammany Parish:

Call Waiting
Message Holding
Speed Calling
Conference Calling
Voice Mail-VMRS Access
Call Forwarding
No-Answer Transfer
Operator Assistance
Credit Card Charging
Data Services
Directory Listing
Emergency Number
Special Information Announcements
Least Cost Toll Routing
Outgoing Call Controlling
Dispatch Service (La Star Ex. 9 at 8).

La Star provides no details or descriptions concerning its proposed service offerings. La Star Ex. 9 at 7-9. However, it does add that:

> La Star intends that each of its special service offerings be cost-based, with all incremental capital and operating expenses recovered with usage charges paid by subscribers actually using each optional service. To the extent that La Star has not included these costs in the cost estimates for its basic cellular service, it did not assume any revenues therefrom. La Star Ex. 9 at 9.

204. There are significant similarities between La Star Ex. 9 and Maxcell's Baton Rouge application filed in 1983. First, the Baton Rouge application contains every service proposed by La Star (and four additional

offerings). NOCGSA Reb. Ex. 12, Ex. L-8 at 7. Further, in terms substantially identical to La Star Ex. 9, the Baton Rouge application also states:

> Star intends that each of its special service offerings to be cost-based, with all incremental capital and operating expenses recovered with usage charges paid by the subscribers actually using each optional service. To the extent that Star has not included these costs in the cost estimates for its basic cellular service, it did not assume any revenues therefrom: NOCGSA Dir. Ex. 5 at 1.

System Management

NOCGSA

205. NOCGSA currently owns and operates the New Orleans wireline cellular market. It is an experienced cellular operator. NOCGSA is a wholly-owned subsidiary of BellSouth Mobility Inc. (BMI), an Atlanta-based cellular carrier which operates over twenty-five cellular markets throughout the southeastern United States. BMI has decentralized its operations into three regions. Pertinent to this case, Region III includes BMI markets in Louisiana, Alabama, Kentucky, Tennessee and Mississippi. BMI's regional operations provide efficiencies to NOCGSA's New Orleans operations and will also serve St. Tammany. NOCGSA Dir. Ex. 5 at 1.

206. The sales, customer service, engineering and maintenance personnel operating out of NOCGSA's New Orleans headquarters located in Metairie (Jefferson Parish) will service St. Tammany. In addition, the Network Service Center (NSC) in Atlanta, which serves to detect technical problems throughout all of BMI systems, will serve St. Tammany. NSC has a network operations monitoring board which displays any problem with cell sites and switches. NSC is a 24-hour a day, 7 days a week operation. NOCGSA Dir. Ex. 5 at 12-21.

La Star

207. La Star asserts that its management team will be headquartered in Larose, Louisiana. It states that the Management Committee members "will direct and ultimately be responsible for the day-to-day operations of the proposed cellular system." La Star Ex. 9 at 1. Expanding on this statement, La Star states that the "management team will make and subsequently implement all policy decisions affecting its cellular system" and that it "will employ, supervise, and if necessary, discipline all personnel connected with the system." La Star Ex. 9 at 1. The following current members are proposed:

> John A. Brady - Chairman
>
> James P. Brady - Vice Chairman
>
> Sinclair Crenshaw - General Counsel
>
> Kenneth R. Meyers - Secretary-Treasurer
>
> H. Donald Nelson - Member

La Star also states that it "intends" to appoint John Brady as the general manager. La Star Ex. 9 at 4.

208. Again, the Baton Rouge application is set up in the exactly the same manner. A Management Committee is established to "make and subsequently implement all policy decisions affecting its cellular system" and Star will "employ, supervise, and if necessary, discipline all personnel connected with the system." NOCGSA Reb. Ex. 12, Ex. L-7 at 1.

Switching Facilities

NOCGSA

209. No additional switch will be required for NOCGSA to serve St. Tammany Parish. NOCGSA Dir. Ex. 5 at 2. NOCGSA's Motorola EMX switch in New Orleans will control the entire New Orleans MSA, including St. Tammany Parish, and serve as an interface with the public switched telephone network. NOCGSA Dir. Ex. 5 at 2.

La Star

210. An additional switch will be required for La Star to serve St. Tammany Parish. Instead of switch sharing, La Star proposes to purchase a Motorola switch. La Star Ex. 11 at 1-2. Where feasible, La Star anticipates sharing the extra switching capacity with other systems. La Star Ex. 11 at 2.

Other Comparative Considerations

211. Both parties have other proposals relating to maintenance and other practices which do not warrant any comparative advantage for either party.

CONCLUSIONS

Threshold Issues

212. The threshold issues require a determination whether La Star is an eligible wireline applicant. In order to be wireline eligible under Section 22.902(b) of the rules, La Star has the burden to prove that the eligible partner (SJI) has been in control of the applicant. Under established Commission precedent, the wireline carrier upon which the applicant's eligibility is based must be in control of the venture when the application is filed and must maintain that control during the entire application prosecution period. *Advanced Mobile Phone Service, Inc.*, (Los Angeles Decision), 93 FCC 2d 683, 692 (1983); *Montgomery Independent Cellular Telephone Company, Inc.*, 4 FCC Rcd 2323, 2325 (1989).

213. The *Los Angeles Decision* defined the standards for wireline eligibility when the applicant is not entirely owned by a local wireline carrier. The Commission stated therein the "ownership interest [of the ineligible carrier] must be minor and control of the company must remain vested in the eligible . . . ." 93 FCC 2d at 692. *See* also *Montgomery Independent, supra*, at 2324-2325. USCC's 49% ownership interest is not minor. Moreover, the evidence of record overwhelmingly establishes that SJI, the eligible carrier, has never been in control of La Star. Because La Star is not wireline eligible, its application must be dismissed.

214. The record makes plain that from the outset and continuing to the present time the 49% ineligible minority venture partners have been the dominant players. During the formation period, the original ineligible Joint Venture partner, Maxcell, was the moving force behind the applicant. The idea of applying for the St. Tammany authorization was the brainchild of Maxcell's principal, William Erdman. SJI was presented with a draft of a Joint Venture Agreement which was virtually identical to the agreement Maxcell used in the Baton Rouge market. The La Star agreement, which remained unchanged until after the Designation Order in this proceeding, set up a 51%/49% ownership structure with SJI, the wireline eligible party holding the majority interest. The Agreement created a five member management Committee to direct the company's affairs. Under the agreement, all of the expenses of filing and prosecuting the La Star application were to be borne by the minority partner and SJI, the majority partner, was to bear no financial exposure until the construction permit was granted.

215. The Agreement subjected many of the enterprises' activities to supermajority voting and minority partner negative control. Among other things, under the Agreement, the ineligible partner had negative control over litigation decisions regarding settlements or prosecution of the application and over the hiring and firing of a general manager or other system management entity. Significantly, despite the warning by SJI principal Brady's local attorney that the supermajority provisions would make it hard to operate the system, Brady could not get any of the supermajority provisions modified or deleted.

216. Maxcell's total domination of La Star's affairs is exemplified by the facts concerning the preparation and filing of La Star's original 1983 application. Maxcell prepared and filed La Star's 1983 application using its regular attorney, in-house engineer and outside consultants hired by its attorney. No SJI personnel worked on the application. Brady had nothing to do with their hiring and did not know them. At hearing, Brady was unable to identify the address on the La Star application, even though the application itself identifies the address as Maxcell's headquarters. Also, a Star Telephone Management Committee member signed the La Star cell site agreement. Brady was unaware of the fact that Maxie Rosweber, a local real estate for Century 21, was working for La Star on obtaining the necessary sites. With regard to the La Star financial commitment, Erdman obtained the loan commitment from a Washington, D.C. bank. Brady did not know anyone at the bank and played no role. Brady testified he received a call from a bank officer who called at the behest of Erdman. Brady believed that the only purpose for the call was "to find out if I was a real person." Tr. 877. In many respects, the La Star 1983 application bears a striking resemblance to Maxcell's Baton Rouge application. Among other things, the same lawyers, engineers and other consultants were used. Also, the same Washington, D.C. bank was used. Also, La Star's Schedule of Proposed Charges Exhibit and its System Management Exhibit mirror identical language in the Baton Rouge application. In this regard, Brady asserts that the six-cell system design was at his "insistence." However, the evidence adduced concerning this assertion, detailed in Findings 40 and 41, demonstrates that Brady's claim lacks credibility and is not accepted. Clearly, Maxcell, its agents and employees made that decision as well as every other decision concerning the 1983 application.

217. Maxcell's domination of La Star's affairs continued throughout Maxcell's ownership period, September 1983-July 1987. The Management Committee established by the Joint Venture Agreement was ostensibly the mechanism agreed to by the parties to govern La Star's affairs. However, only one Management Committee was held during this four year period -- despite the multitude of La Star events which transpired, *e.g.*, Commission dismissal of the La Star application, appeal to the court, reinstatement etc. What emerges from the record of this period is that concurrent with payment of all La Star expenses, Maxcell had carte blanche authority to manage La Star's affairs without supervision, oversight or involvement of SJI. The adage that "he who pays the piper calls the tune" is particularly apt here. As reflected, *infra*, the same pattern of conduct governed La Star's affairs after USCC's succession as the 49% minority partner.

218. As a further example of Maxcell's domination, following the October 1984 dismissal of the La Star application, La Star changed counsel. Again, Maxcell and specifically Kent Nakamura, its general counsel, hired La Star's new attorney, Arthur Belendiuk. Belendiuk, who continues to serve as La Star's counsel, signed pleadings as counsel of record for Maxcell subsequent to his hire as counsel for La Star. Significantly, Brady had not met or worked with Belendiuk at the time of his hire and was barely familiar with Nakamura. In this regard, it is noteworthy that in 1986, SJI, through its wholly-owned subsidiary, MobileTel, Inc., filed a cellular application for the Houma-Thibodaux MSA in Louisiana. SJI used Howard Symons of the law firm of Mintz, Levin, Cohn, Ferris, Glovsky & Popeo, P.C. as FCC counsel for the filing. Symons is still SJI's FCC's counsel. However, neither Symons or any of the other experts employed in connection with SJI's Houma-Thibodaux application were used in La Star's 1987 amendment or in any other aspect of La Star's prosecution of its application. Also, throughout this period as well as the subsequent USCC period, SJI had no idea whether the ineligible partner had prepared and filed La Star's tax returns; never reviewed the books and records kept by the ineligible partner; and did not monitor the debt being incurred by the minority partner, despite the fact that such debt was supposed to be repaid out of system profits.

219. Again, from August 1987 to May 1990, the USCC ownership period, USCC was the dominant partner. There is no evidence of SJI direction and oversight over the extensive La Star activities which took place and in which USCC personnel were involved. For instance, SJI's failure to call meetings (by phone conference or otherwise) or to otherwise communicate with the minority partner was remarkable, especially in view of the multitude of La Star events and the number of activities undertaken by USCC personnel. Contrary to La Star's contention, this was not a situation in which the ineligible partner performed only "ministerial" tasks and the eligible partner did everything else. In this case, *only* the ineligible partner had "active input" and participated in the prosecution of La Star's application. From August 1987 to May 31, 1990 the record reflects that:

> La Star was governed under the same Joint Venture Agreement which gave the ineligible partner negative control over many La Star matters, as well as total financial responsibility.

La Star had only one Management Committee meeting (in Chicago) and, according to Nelson, no substantive La Star business was discussed at this meeting held after USCC purchased Star.

USCC had open-ended authority to get "the necessary expertise to proceed with [Commission] filings" and to hire whomever it needed for such filings;

USCC has authority "to prepare any and all required documents and/or contracts necessary to proceed with La Star's efforts at the FCC";

USCC authorized the payment of La Star agents and paid all such agents directly and without coordination with SJI for ongoing La Star work;

USCC obtained the financial commitments establishing La Star's basic qualifications for La Star's 1987 and 1988 Commission filings;

USCC worked directly with La Star counsel with no SJI contact;

USCC worked with Mr. Biby (La Star's outside engineer) and Ms. Resweber (a local real estate agent) on La Star site matters;

USCC signed site renewal agreements and options;

USCC inserted the rates into the rate schedule exhibit for La Star's 1987 amendment and direct case exhibit using a USCC rate compilation book;

USCC prepared an affidavit to defend against an NOCGSA petition to deny;

USCC reviewed the work product of La Star's outside consultants without coordinating with SJI (*e.g.*, Mr. Biby, Dr. Anderson);

USCC had negative control over the hiring and firing of the general manager or other system management entity and over litigation settlement decisions regarding the La Star application;

USCC prepared and filed La Star's 1988 and 1989 tax returns listing itself as the designated tax partner and USCC's address in Chicago as La Star's, even though no decisions regarding tax matters had been made by the Management Committee; and

USCC kept La Star's books and records and ignored SJI requests for an accounting of La Star's ongoing expenses.

220. La Star attempts in its Findings to explain away SJI's non-involvement and USCC's pervasive involvement. La Star argues, for the first time, that Belendiuk, La Star's attorney "was delegated authority to act as a fulcrum for coordinating the prosecution of La Star's application." La Star Proposed Finding 544. It is further argued that USCC employees and third party participants who assisted in the prosecution of La Star's application did so under Belendiuk's direction. *See* La Star Proposed Findings 544, 546, 547.

221. There is no support in the record for La Star's *post facto* relationalization. Initially, La Star's assertion of Belendiuk's decision making role can not be reconciled with Belendiuk's own statements as to the nature of his participation. At the evidentiary admission session, Belendiuk made the following statements:

Mr. Belendiuk: Your Honor, I have never been commingled with my client's defense. I have, at all times, acted as an attorney in this proceeding.

* * *

[A]t all times, I've acted as a lawyer, not as a principal . . . And have not made decisions . . . .

* * *

I have not made a single decision for La Star other than very minor ones such as requesting motions for extension of time and such like that. Tr. 754-755.

222. Additionally, there is no record evidence of a Management Committee meeting delegating any authority to Belendiuk. Also, it would appear that such delegation would violate the Agreement which places on the Management Committee exclusive authority to run La Star. Even if such delegation could have complied with the Agreement, it would violate the Commission's wireline eligibility control which requires SJI and not La Star's counsel to be in control of the La Star enterprise. In this connection, there is no evidence in the record which even suggests that SJI was orchestrating and overseeing counsel's activities, or, for that matter, was even aware of the many activities engaged in by USCC and its employees on behalf of La Star. This is abundantly clear since USCC did not coordinate or check with SJI regarding La Star activities and never questioned the propriety of SJI's non involvement. Also, the facts reveal that La Star's second counsel, Belendiuk, as well as its first counsel, William Franklin, was hired by Maxcell; worked simultaneously for La Star and Maxcell and never for SJI; worked with the successor interest-holder in Star - USCC - on La Star matters; and was paid by the minority partner (first Maxcell/Star and than USCC) until at least July 1990. Therefore, the evidence suggests that counsel was, throughout the relevant period, more the agent of the ineligible partner, than the agent of SJI. La Star might have a more stronger agency argument if it had chosen counsel used by SJI for other cellular matters. In sum, it does not follow from the fact that Belendiuk is La Star's counsel that he is SJI's agent or that his actions can be attributed thereto.

223. As stated by the Commission in designating the wireline eligibility issue in this proceeding, [t]he criteria for determining whether a given party has control . . . are as follows:

1) Who controls daily operations?

2) Who determine and carries out the policy decisions, including preparing and filing applications with the Commission?

3) Who is in charge of employment, supervision and dismissal of personnel?

4) Who is in charge of the payment of financing obligations?

5) Who receives monies and profits derived from the operation of the facilities?

6) Does the eligible party have unfettered use of all facilities and equipment? *HDO* at note 12.

In addition to the above-described indicia of control, which are referred to as the "*Intermountain*" criteria,[16] the Commission also looks particularly at the "terms of any financial arrangement," (*HDO* at Note 12) since "one of the most powerful and effective means of control of any business . . . is the control of its finances." *HDO* at n. 12 (quoting *Cornbelt Broadcasting Co.*, 14 Rad. Reg. 2d (P&F) 794, 795 (1968)). Consistent with these guidelines, the record establishes that SJI has never been in control of La Star. Rather, the record clearly shows that first Maxcell[17] and later USCC have always controlled this applicant. It is concluded that La Star does not meet the Commission's wireline presence requirement in the New Orleans MSA. Therefore, its application is dismissed.

Contingent Comparative Issues

224. In light of the conclusion that La Star does not meet the wireline eligibility standards and that dismissal of its application is mandated, it is not necessary to reach the contingent comparative issues. However, out of an abundance of caution, abbreviated conclusions are provided.

Community Of Interest (Issue 1)

225. The record establishes that there are close connections between St. Tammany Parish on the one hand and Orleans Parish and Jefferson Parish, on the other. Furthermore, there is a strong community of interest between St. Tammany Parish and New Orleans. At the very least, the economies of St. Tammany Parish and Orleans Parish have been shown to be closely related. Further, it is undisputed that 22.6 percent of St. Tammany Parish workers commute to New Orleans to work, and much of the personal income earned by residents of St. Tammany Parish is earned outside the parish. In addition, there are strong social, political, and educational ties between St. Tammany Parish and New Orleans. Thus, the evidence of the community of interest between St. Tammany Parish and New Orleans is overwhelming.

Operational Efficiencies (Issue 5)

226. Since a community of interest between New Orleans and St. Tammany Parish has been demonstrated, NOCGSA receives a significant preference for the public benefits NOCGSA can provide to the residents of St. Tammany Parish by serving its proposed expansion area in conjunction with NOCGSA's existing service area. The operational efficiencies which result by serving those areas with one cellular radio system are impressive. Thus, NOCGSA will achieve economic efficiencies by utilizing the same switch (MTSO) for its entire service area, whereas La Star would utilize a separate switch for the St. Tammany Parish service area. NOCGSA would not incur any expenses for coordinating its frequencies with those of La Star if NOCGSA's application herein is granted. Further, NOCGSA would not incur other costs which La Star plans to incur, such as the costs of interconnecting La Star's switch to NOCGSA's switch to prevent calls from "dropping off" between the two systems and the costs of interconnecting La Star's system with the local public landline exchange. All of the foregoing cost savings by NOCGSA would enable NOCGSA to offer lower prices to consumers and thus serve the public interest.

227. One of the greatest benefits which would be experienced by St. Tammany Parish residents if NOCGSA operates the North Shore system in conjunction with the existing South Shore system is that St. Tammany residents will not be "roamers" when they commute to New Orleans. In addition, customers from other parts of the New Orleans MSA would benefit because they would not be roamers when they travel to St. Tammany. Although La Star speculates that it and NOCGSA could make arrangements whereby customers of each of their cellular systems could be treated as "home" customers, there is no record evidence that such arrangements have been made or that NOCGSA is willing to make such arrangements and there is no Commission rule or policy requiring such arrangements between neighboring cellular operators. Further, NOCGSA's joint operation of its St. Tammany cells with its New Orleans cells will allow NOCGSA to utilize its existing staff presently in place for its New Orleans cellular system, thus reducing costs for service provided to St. Tammany Parish. Additionally, NOCGSA could conduct a more efficient advertising campaign than La Star to compete with Radiofone, the non-wireline carrier for the entire New Orleans MSA, because NOCGSA could use New Orleans-based mass media effectively to advertise for its MSA-wide services. Overall, NOCGSA, by means of the various operational efficiencies discussed above, will provide more effective competition to Radiofone and thus keep the prices paid by cellular consumers in St. Tammany Parish at the lowest possible level, consistent with the public interest.

Geographical Area (Issue 2)

228. It is unnecessary to decide whether the MSAM TIREM methodology is superior to the Carey methodology. Under either methodology, the differences in populations to be served are mathematically insignificant. Neither applicant receives a preference. Using La Star's calculations of coverage under the Carey procedures, La Star will serve 110,285 people in the area of 1,034 square miles, whereas NOCGSA will serve a total population of 107,104 in an area of 1,005 square miles. La Star Dir. Ex. 1, pp. 1-2. Thus, La Star will serve about 3,000 more people than NOCGSA and will cover about 30 more square miles with its 39 dBu signal that NOCGSA. Although Commission decisions in the top-30 cellular radio markets have awarded preferences based upon relatively small differences in the percentages of MSA and populations to be served, a preference has not been awarded based on a numerical difference in populations as small as that revealed by the Carey procedures in this proceeding. Further, any "pockets" to be served by La Star do not appear to be areas where there is a high potential for cellular radio usage.

229. In *Gencom, Inc. (Gencom)*, 56 RR 2d 1597 (1984); *modified on recon.*, 60 RR 2d 575 (1986); *affirmed sub nom. Gencom, Inc. v. FCC*, 832 F. 2d 171 (1987), the winner proposed to provide service to 15 more square miles and 15,000 more people in the Phoenix, Arizona MSA than the applicant with the second best coverage. Further, the winner in that case would provide exclusive coverage to 22,000 people living in a "pocket" of the MSA that appeared to have high potential for mobile

radio usage because it was an area likely to experience substantial residential, commercial and industrial development. The Commission there gave Metro Mobile CTS of Phoenix, Inc. (Metro Mobile) a slight preference for its superior coverage.[18] The award of a "slight" coverage preference to Metro Mobile in *Gencom* was generous, compared to other cases where applicants received a "slight" coverage preference because their showings were considerably superior to their nearest competitors, in terms of total square miles and people served. *See, e.g., MCI Cellular Telephone Company*, 96 FCC 2d 1015; *recon. denied*, 98 FCC 2d 1274 (1984); *affirmed sub nom. Cellular Mobile Systems of Pennsylvania, Inc. v. FCC*, 782 F.2d 182 (D.C. Cir. 1985). *See also Rogers Radiocall, Inc.*, 96 FCC 2d 1171; *recon. denied*, 98 FCC 2d 1293 (1984); *aff'd. sub nom., Cellular Mobile Systems of Illinois, Inc. v. FCC*, 782 F.2d 214 (1986). The cases cited by La Star, discussed in the Bureau's reply does not assist La Star since those cases involved service to a far greater population and significant "pockets" of high potential for cellular radio use. Therefore, the Presiding Judge agrees with the Bureau that no preference should be awarded to either applicant.

Demand/System Expansion (Issues 2 & 4)

230. NOCGSA receives a comparative preference on the second and third sub-issues of comparative issue 2 for its coordination of demand with system design and quality of service. La Star proposes to construct and operate a six-cell system in St. Tammany Parish. It did not correlate the six-cell design and demand for cellular service in St. Tammany. The six-cell design is not population-based since it covers virtually the entire Parish. Further, La Star's estimation of customers in the first year of service shows two cells serving approximately 50 subscribers. While it is difficult to fathom La Star's basis for proposing a six-cell system, it clearly was not based on its demand survey. NOCGSA proposes to operate a four-cell system tailored to meet existing and projected future demand in St. Tammany Parish. Unlike La Star's proposal, NOCGSA's system design is based on its demand, the result of which ensures cellular service to virtually all population centers, local businesses, registered motor vehicles and highways in St. Tammany Parish.

231. NOCGSA designed the St. Tammany portion of its cellular system to use all the voice channels allocated to the block B frequency, including the additional 10 MHz allocated to cellular in 1986. The NOCGSA cellular system will be operated as an integrated system and share a common switch in the New Orleans MSA. The circuit requirements proposed for NOCGSA's four-cellular system are based on marketing forecasts and usage projections.

232. La Star has made frequency channel assignments based on certain assumptions regarding demand for service and cell overlap. La Star channel assignments include: 9 voice channels for Cell No. 001 (Salt Bayou); 9 voice channels for Cell No. 002 (Pearl River); 6 voice channels for Cell No. 003 (Lacombe); 7 voice channels for Cell No. 004; 5 voice channels for Cell No. 004 (Madisonville); and, 6 voice channels for Cell No. 006 (Folsom). Salt Bayou is in the Slidell area -- the most populated region in the Parish. NOCGSA has devoted 24 voice channels while La Star has devoted 9 channels. Moreover, in one of the most remote areas of the Parish -- Pearl River -- La Star devotes the same number of channels. NOCGSA devotes 24 channels to another populated area -- Mandeville. La Star's closest site to this area is Lacombe and it proposes 6 channels. La Star devotes 6 channels to another remote area -- Folsom. Finally, NOCGSA proposes 33 more voice channels on a system-wide basis than La Star.

233. NOCGSA also deserves a preference for its superior Roamer plan. La Star provided very little information in the record from which to evaluate its proposed service to roamers. In its 1987 amendment and 1983 application, La Star indicated that it intended to provide roamer service to "permanent subscribers of another system" and that it would offer "levels" of roaming service "depending on the business relationship between La Star and the cellular system to which the roamer subscribes."

234. NOCGSA, on the other hand, has proposed a fully developed roamer plan. It will integrate its four cells serving St. Tammany Parish into the New Orleans system. Thus, St. Tammany Parish customers will be home subscribers in the entire New Orleans MSA. As home subscribers, these customers will not be subject to daily access rates or roamer fees when traveling between St. Tammany Parish and New Orleans. NOCGSA also has roaming agreements with 77 cellular service providers outside St. Tammany Parish. St. Tammany Parish subscribers will automatically have the ability to use their cellular telephones within these cellular service areas. Further, through BMI, St. Tammany Parish subscribers will also have automatic roaming in 526 systems in the United States, Canada, the Dominican Republic and the Bahamas. Finally, roamers will be able to place and receive calls on a 24 hour per day, 7 days a week basis in St. Tammany Parish and NOCGSA proposes to offer a variety of services and customer help information to roamers on its system.

235. There is no basis to award a preference to either applicant with regard to coordinated expansion. However, NOCGSA's superior system proposal with regard to efficient frequency use warrants a slight preference.

Service Proposals (Issue 3)

Rates

236. NOCGSA receives a preference for its proposed rate structure. NOCGSA's rates proposal is presently on file with the Louisiana PSC. In contrast, the features associated with La Star's rate proposal -- cost-based rates, usage sensitive pricing, etc. -- have been lifted almost verbatim from the 1983 Star Baton Rouge filing. Moreover, no documentation was filed to support La Star's rate proposal.

Services

237. NOCGSA's proposal is largely based on services being offered in New Orleans today. In contrast, La Star's service proposal is completely theoretical and based in large part on the 1983 theoretical Baton Rouge filing. NOCGSA receives a preference.

238. NOCGSA has put forward three levels of oversight. First, the local New Orleans office in Metairie will be responsible for St. Tammany operations, customer service and sales. Second, Region II personnel will include St. Tammany within its southeastern group of cellular oper-

ations. This group already oversees New Orleans operations. Third, NOCGSA has proposed, in addition, centralized oversight of operations from the NSC in Atlanta. This scheme is already in working operation.

239. In contrast, La Star relies on its discredited Management Committee. La Star's representations that this Committee has been managing the applicant's day-to-day affairs has been shown to have no basis in fact. Moreover, La Star's statement that the Committee will closely supervise La Star on a day-to-day basis from Larose is not credible -- especially since two of the members are located in Chicago. The statement that the Committee will collectively run La Star's affairs from Larose headquarters is further undermined by Nelson's assertion that once the La Star system becomes operational, he will have very little involvement in La Star matters. *See* USCC Ex. 1 at 13-16. NOCGSA's proposed system management receives a preference.

Switching Capabilities

240. NOCGSA's switching proposal for St. Tammany is superior because it proposes no new switch. La Star proposes a new switch. Given its limited initial service projections, this proposal is inefficient and wasteful. For example, La Star projects 633 customers the first year; 1,041 the second. In contrast, the entire New Orleans system is presently served by one switch. La Star attempts to head off the problem by committing to share the excess capacity. There is no record evidence of any commitments to date. NOCGSA receives a preference.

241. In summary, based on the award of preferences to NOCGSA on issues 1, second and third sub issues of issue 2, issue 3, issue 4 and issue 5, NOCGSA would be the comparative winner.

Accordingly, IT IS ORDERED, That the application of La Star Cellular Telephone Company for a construction permit for facilities operating on Block B in the Domestic Public Cellular Radio Telecommunications Service in the New Orleans, Louisiana, MSA IS DISMISSED, and the application of New Orleans CGSA, Inc. to amend its construction permit for facilities operating on Block B in the Domestic Public Cellular Radio Telecommunications Service, Call Sign KNK224, in the New Orleans Louisiana, MSA IS GRANTED.[19]

FEDERAL COMMUNICATIONS COMMISSION

Joseph Chachkin
Administrative Law Judge

FOOTNOTES

[1] The Commission denied La Star's application for interim operating authority in St. Tammany Parish.

[2] USCC filed findings and a reply to the findings and conclusions of NOCGSA. The reply filed May 3, 1991 includes a lengthy Addendum containing material which is not part of the record and which USCC concedes has nothing to do with the threshold issues. The addendum and attached material will not be considered and is stricken. Also, USCC's request for official notice of such material is denied.

[3] Hearing sessions were held beginning November 19, 1990 and concluded on January 30, 1991. The record was closed on the latter date. The record was subsequently reopened to receive an exhibit proffered by USCC (Exhibit 1) and reclosed. *See Order*, FCC 91M-1194, released April 4, 1991. NOCGSA and La Star filed findings and conclusions on the threshold and comparative issues. The Bureau's findings and conclusions deal only with comparative issues, 1, 2 and 5.

[4] NOCGSA may not receive any comparative advantage for its financial investment or for its cellular operations within St. Tammany Parish. La Star Cellular Telephone Company, 4 FCC Rcd at 3783 N. 18.

[5] *See Cellular Communications Systems*, 86 FCC 2d 469, 503 (1981), for a discussion of the relative importance of the evidence submitted under this issue.

[6] In making this comparison, preference should be given to designs entailing efficient frequency use, including not only the applicant's plans with regard to cell-splitting and additional channels, but also the degree of frequency re-use the system will be capable of, and the applicant's ability to coordinate the use of channels with adjacent or nearly cellular systems.

[7] In June 1990, La Star sought permission to remove and/or revise provisions of the Joint Venture Agreement. La Star's "Motion For Leave To Amend And Amendment" filed June 18, 1990 was denied and the amendment rejected. *See* FCC 90M-2354, released August 3, 1990.

[8] On January 1, 1984, the AT&T divestiture took effect. AMPS' cellular interests in the BellSouth region were transferred to BellSouth Corporation.

[9] Official notice taken of General Docket sheet and notice of appeal in *La Star Cellular Telephone Company v. FCC*, D.C. Circuit No. 85-1332, listing Belendiuk as counsel for La Star, the appellant; and General Docket sheets and petitions for review in *Maxcell Telecom Plus, Inc. v. FCC*, D.C. Circuit Nos. 85-1331 and 85-1332, showing Belendiuk as counsel for Maxcell, the petitioner.

[10] La Star asserts that 800 square miles of the proposed service area is land area, of which 786 square miles fall within St. Tammany Parish. La Star claims that the 14 square miles of land area within La Star's proposed Cellular Geographic Service Area (CGSA) but outside of St. Tammany Parish cover virtually uninhabited marsh in Orleans Parish. La Star explains that it proposes to serve this small area so that it can provide continuous service to users along Interstate 10, State Route 90 and State Route 11. La Star Direct Exhibit 1, pp. 1-2.

[11] A demographic analysis was conducted by BMI market personnel to evaluate the characteristics of La Star's claimed unique service area and to forecast the five-year demand for cellular service in the area. NOCGSA Reb. Ex. 8 at 1. Because La Star's claimed unique area is mostly rural, BMI forecasted demand using its standard RSA forecasting techniques. Based on BMI market forecasts, NOCGSA estimates that the five-year (single carrier) demand potential for cellular is 88 people, or slightly less than 18 people per year. La Star did not object to BMI's demand estimates or rebut its findings. La Star's first year demand estimates for the entire northwestern corner of the Parish (cell site 006 serving the Folsom area) was 57 people. La Star Ex. 3 at 2. La Star did not do a separate demand study of its claimed unique service area.

[12] The TIREM model or method was developed by the Electromagnetic Compatibility Analysis Center. It predicts propagation loss between two points taking into account the frequency, atmospheric and ground constants, and the characteristics of the terrain profile between the two points. NOCGSA Reb. Ex. 35, Att. 2, p. 21.

[13] The applications herein were filed on FCC Form 401. All versions of the form pertinent to this proceeding contain a table which requires an applicant to calculate the ERP for eight radials. The foregoing table was required by Item 26(a) of the 1977 form and by Item 37, Schedule B of the 1985 form. Thus, the applicants herein have already calculated the ERP for each antenna along eight radials.

[14] On January 1, 1984, BMI succeeded to AMPS' cellular interests and, thereafter, NOCGSA (BMI's wholly-owned subsidiary) became the New Orleans MSA licensee. NOCGSA Dir. Ex. 4 at 4.

[15] *See* Findings regarding genesis of La Star joint venture.

[16] *Intermountain Microwave*, 24 Rad. Reg. (P&F) 983, 984 (1963). By Public Notice Rpt. No. CL-87-1 (released October 2, 1986), the Commission adopted these guidelines for cellular.

[17] La Star and USCC assert that consideration of facts prior to USCC's involvement in La Star (August 1987) is prohibited by the HDO. This contention is without merit. First, this argument ignores the fact that evidence concerning the prior period was offered by La Star. NOCGSA was entitled to cross-examine Brady regarding assertion in his written direct case that he was the moving force behind the formation of the original La Star Joint Venture in 1983. Further, the Commission contemplated a full review of the relevant facts under the wireline eligibility standard. The designated issues do not limit SJI's maintenance of control to any time period. Moreover, the Joint Venture Agreement, the principal basis for designation of the threshold issue was entered into in the prior period. Also, as discussed, *supra*, the case law holds that the eligible carrier must be in control when the application is filed and must remain in control during the pendency of the application. Thus, whether SJI was in control of La Star from the beginning is relevant and within the scope of the designated control issue. Even if the control issue was limited in the manner suggested by La Star and USCC, the record would still mandate the dismissal of La Star's application.

[18] In its 1986 decision on reconsideration, *inter alia*, the Commission gave a more complete explanation of its 1984 decision and ranked the three applicants in the case under the coverage issue. The Commission ranked Metro Mobile first, Cellular Mobile Systems of Arizona, Inc. (CMS) second and Gencom, Inc. (Gencom) a clear third under that issue. It also awarded CMS a slight coverage preference over Gencom and awarded Metro Mobile a moderate coverage preference with respect to Gencom.

[19] Pursuant to the *Designation Order*, exceptions to this Initial Decision under Section 1.276 of the Commission's Rules, shall be taken directly to the Commission. In the event that exceptions are not filed within 30 days after the release date of this Initial Decision, and the Commission does not review the case on its own motion, this Initial Decision shall become effective 50 days after its public release pursuant to Section 1.276(c).

Before the
Federal Communications Commission
Washington, D.C. 20554

REISSUED

MM Docket No. 91-309

In re Applications of

Frank K. Spain (hereafter "Spain")	File No. BPH-900119MN
Temecula Valley Broadcasting (hereafter "TVB")	File No. BPH-900122ML
Los Amigos Media, A Limited Partnership (hereafter "Los Amigos")	File No. BPH-900122MM
Kimler Broadcasting, Inc. (hereafter "Kimler")	File No. BPH-900122MN
Artistic Airwave Broadcasters (hereafter "Artistic")	File No. BPH-900122MP
The AnnGie Corporation (hereafter "AnnGie")	File No. BPH-900122MU
Laura Wilkinson Herron (hereafter "Herron")	File No. BPH-900122MY
Avid Communications, Inc. (hereafter "Avid")	File No. BPH-900122NF
Natalie Lederer Rogers (hereafter "Rogers")	File No. BPH-900122NN
Temecula Communications, a California Limited Partnership (hereafter "TCLP")	File No. BPH-900122NS
New Town Communications, Inc. (hereafter "New Town")	File No. BPH-900122NR (Dismissed Herein)
MCI Broadcasting, Limited Partnership (hereafter "MCI")	File No. BPH-900122MO (Dismissed Herein)
Alexsii Corporation (hereafter "Alexsii")	File No. BPH-900122NQ (Dismissed Herein)
Temecula Broadcasters, Inc. (hereafter "TBI")	File No. BPH-900122NM (Dismissed Herein)
Valley View Broadcasting Corporation (hereafter "Valley View")	File No. BPH-900122NW (Dismissed Herein)
B & M Broadcasting, Inc. (hereafter "B & M")	File No. BPH-900122NY (Dismissed Herein)
FM Data Broadcasting, Inc. (hereafter "FM Data")	File No. BPH-900122MS (Dismissed Herein)
Temecula Broadcasting Company (hereafter "TBC")	File No. BPH-900119MM (Dismissed Herein)

For Construction Permit for a New FM Station on Channel 233A (94.5 MHz) in Temecula, California

HEARING DESIGNATION ORDER

Adopted: November 15, 1991; Released: November 25, 1991

By the Chief, Audio Services Division:

1. IT IS ORDERED, That the previous hearing designation order released in this proceeding, MM DOCKET NO. 91-309, released October 31, 1991, is hereby **VACATED** and **REISSUED** with revisions having been made. This action is taken pursuant to 47 C.F.R. § 1.113 (a).

2. The Commission has before it the above-captioned mutually exclusive applications for a new FM station.

3. On July 15, 1991 and September 25, 1991, New Town and MCI, respectively, requested dismissal of their applications for a construction permit for a Temecula facility. The requests include declarations that the applicants have not been promised and have not received any consideration for the requested dismissals. Therefore, New Town and MCI have complied with 47 U.S.C. § 311(c)(3) and 47 C.F.R. § 73.3525(a) and their applications will be dismissed.

4. FM Data, TBI, Alexsii, Valley View, and B & M did not pay the hearing fee by July 15, 1991, the date set forth in *Public Notice*, Mimeo No. 13110, released May 15, 1991. Accordingly, their applications will be dismissed. *See* revised Section 73.3573(g)(2) of the Commission's Rules and *Report and Order* in Gen. Doc. 90-264 ("Proposals to Reform the Commission's Comparative Hearing Process"), 6 FCC Rcd 157, 157-8 and 170 (1990); *Erratum*, 6 FCC Rcd 3472 (1991); *recon. granted in part*, 6 FCC Rcd 3403 (1991).

5. Preliminary *Matters*. An engineering study of the proposals of Spain, Los Amigos, AnnGie, Rogers, and TCLP reveals that these five applicants are short spaced in the following manner:

STATION	SHORT SPACED APPLICANT(S)	LOCATION
KIKF-FM	Spain; AnnGie; Rogers	Garden Grove, Ca.
KTWV-FM	Spain; Los Amigos; AnnGie; Rogers; TCLP	Los Angeles, Ca.
KWST-FM	Spain; Los Amigos; AnnGie; Rogers; TCLP	Brawley, Ca.[1]

6. In the *Second Report and Order* in MM Docket No. 88-375, 4 FCC Rcd. 6375 (1989), the Commission revised Section 73.207 to allow licensees of Class A FM stations an opportunity to increase effective radiated power up to a maximum of 6 kW at an antenna height above average terrain of 100 meters or its equivalent. This increase in power required the adoption of increased separation distances for Class A stations to prevent interference. Existing stations at locations that did not meet the new separation distances that became short spaced as a result of the rule change were "grandfathered." The new rules became effective on October 2, 1989.

7. Channel 233A was allotted to Temecula, California via the Commission's *Notice of Proposed Rule Making*, MM Docket No. 88-65, 3 FCC Rcd. 823 (1988), and *Report and Order* in MM Docket No. 88-65, 4 FCC Rcd. 7895 (1989).[2] The applicants for this allocation were required to comply with the new spacing rules,[3] because the window opened on December 22, 1989, almost three months after the effective date of the new rules. *See, Report and Order, supra*, in MM Docket No. 88-65 at 7897. Since the Temecula rulemaking was initiated before October 2, 1989, the effective date of the new Section 73.207 rules, but released after that date, the applicants for the Temecula allotment could have assumed they were not required to comply with the "new" Section 73.207 rules. This "gray" area has led to some confusion by applicants of several FM allotments, including the short spaced applicants herein.

8. In a clarification of its policy regarding applications for construction permits filed to implement allotments resulting from petitions for rulemaking to amend the Table of FM allotments filed prior to October 2, 1989, the Commission stated in a memorandum opinion released earlier this year that, "[s]uch applications must meet the new spacing requirements with respect to all facilities and allotments *except those to which the allotment reference coordinates were short-spaced on the effective date of the allotment*. In addition, such applications must meet the new spacing requirements with respect to all pending applications that are fully spaced to the reference point for the new allotment." *Memorandum Opinion and Order*, MM Docket No. 88-375, 6 FCC Rcd. 3417, 3418 at n. 7 (1991) (emphasis added).

9. Under the old rules, the Temecula allotment met the distance separation requirements with respect to the licensed facilities of KWST-FM. Under the new rules, the allotment became short spaced by 9.6 kilometers to KWST. Since the Temecula allotment became short spaced because of the rule change, the allotment was "grandfathered" and applications filed pursuant thereto are *permitted to be short spaced under the new rules only to the licensed facilities of KWST*.

10. The *Report and Order, supra*, in MM Docket No. 88-65, which allotted the channel to Temecula, did not mention that the only allowable short spacing under the new rules was with KWST. This, combined with the allot-

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[1] On August 6, 1990, New Town filed petitions to deny the applications of the five applicants listed above, based on the general contention that they "fail to meet the minimum distance separation requirements of Section 73.207 of the Commission's Rules or qualify for processing under the grandfather provisions of Section 73.213(c)(1)..." Petition at 3. Each of the five applicants filed an opposition to New Town's petition and New Town, in turn, filed a reply against each of them.

Specifically, New Town contends that these applicants "are unacceptable for filing pursuant to the Commission's policy as stated in *Donovan Burke*, 104 FCC 2d 843, 60 RR 2d 110 (1986), and should be dismissed as having been inadvertently accepted for filing under Section 73.3566(a) of the Commission's Rules." Id. New Town's interpretation of the *Donovan Burke* policy is that short spaced applications, which are in violation of the minimum distance separation requirements after the expiration of the period for filing amendments as of right, are considered unacceptable for filing and are to be returned if other applicants propose fully spaced sites. As of June 11, 1990, the deadline for filing amendments as of right, there were nine other applicants who had proposed fully spaced sites. In light of the action taken herein, New Town's petition will be denied.

[2] Three counterproposals, filed by various parties, requested the allotment of Channel 225A to Sun City, California, Rancho California, California, and Temecula, California. Said counterproposals were filed in response to a petition filed by Claridge Broadcasting Corp. ("Claridge"), licensee of Station KCMJ-FM, Channel 224A, Indio, California. Claridge had requested the substitution of Channel 225B for Channel 224A at Indio and modification of its license to specify operation on the higher powered channel. To accommodate its proposal, Claridge requested the deletion of Channel 225A at East Hemet, California.

The Commission granted this request and after due consideration allotted Channel 225A to Sun City. Subsequently, an engineering analysis was conducted to determine whether any additional channels were available for allotment to the remaining communities. The Commission found that Channel 233A was available for allotment to either Temecula or Rancho California as a first local service. After consideration of all relevant factors, the Commission determined the public interest would be better served by the allotment of the channel to Temecula. *See, Report and Order, supra*, in MM Docket No. 88-65, at 7896 and 7897.

[3] *See, Second Report and Order*, MM Docket No. 88-375, 4 FCC Rcd 6375, 6382 (1989).

ment's newly grandfathered status, apparently resulted in an assumption by the short spaced applicants that any new short spacing created as a result of the implementation of the new rules, such as that with KIKF or KTWV, was permissible. The usual consequence of short spacing is dismissal. However, considering the lack of clarity of the rules prior to adoption of the *Memorandum Opinion and Order, supra,* in this instance, we believe that such a harsh result, i.e., the return of the short spaced applications with no opportunity to correct the defect, is unwarranted. As the D.C. Circuit has held, fundamental fairness requires that the more exacting the application standard, the greater the Commission's obligation to be explicit about any prerequisites for consideration. *Salzer v. FCC,* 778 F.2d 869 (D.C. Cir. 1985).

11. Accordingly, Spain, Los Amigos, AnnGie, Rogers, and TCLP, will be required to submit an amendment, which eliminates their respective short spacing with either KIKF-FM or KTWV-FM, or both, and which brings their applications into compliance with 47 C.F.R. § 73.207, to the presiding Administrative Law Judge within 30 days of the release of this Order.

12. *Mexican Agreement-TBC.* On August 6, 1990, the last day to file petitions to deny, TCLP filed a petition to deny the application of TBC based on the contention that the facilities specified by TBC are violative of Annex IV of the Mexican Agreement. TBC has filed an opposition and TCLP a reply. Specifically, TCLP contends that TBC "has used an effective radiated power of ... 0.407 kW and an antenna... [HAAT] of 245 meters (804 feet). Referring to Annex IV of the Mexican Agreement..., it can be seen that for an antenna height of 804 feet, the power should be approximately... 0.302 kW." Thus, TCLP asserts, TBC's ERP exceeds by 34.7% that permitted by the Mexican Agreement.

13. As explained in Section 73.1650 of our Rules, FM authorizations are subject to compliance with the Mexican Agreement, which defines, among other things, classes of stations by power and height limitations and specifies minimum distance separation requirements. The Mexican Agreement contains a table of allotments which associates classes of stations, as defined in the Agreement, with specific channels and communities. Consequently, allotments within 320 kilometers of the Mexican border are listed twice - once in our domestic table (Section 73.202) and once in the Agreement. Domestically, the Class A limitations are 6 kW at 100 meters, but in the Agreement they are 3 kW at 91 meters. Thus, applications for a vacant Class A allotment which specify facilities in excess of 3 kW at 91 meters within the Mexican border zone are not acceptable for filing unless the table of allotments in the Mexican Agreement has already been negotiated and changed to a higher class.

14. The Temecula allocation in this proceeding is a Class A allotment both domestically and internationally. Pursuant to Section 73.207(b)(3) of the Rules, the maximum facility possible for a Class A FM station located within 320 kilometers of the Mexican border is 3 kW at 91 meters, but other combinations of ERP and HAAT are acceptable if in compliance with the curves of Annex IV of the Mexican Agreement, which, *inter alia,* imposes strict limitations on the power, height, and proximity of domestic FM stations near the Mexican border areas.

15. An engineering review of TBC's application reveals that the TBC proposal maintains ERP and HAAT parameters that exceed Annex IV of the Mexican Agreement. As stated previously, TBC used an ERP of 0.407 kW with an antenna HAAT of 804 feet. TCLP is correct in its assertion that an antenna height of 804 feet can only accommodate an ERP of approximately 0.302. Consequently, TBC's application is in violation of 47 C.F.R. § 73.207(b)(3) and the Mexican Agreement. As indicated in TBC's application, the applicant derived the derated ERP figure by employing Section 73.211(b)(2) of the Commission's Rules rather than deriving the ERP directly from Annex IV of the Mexican Agreement. This procedural method has lead to a result that differs significantly from the result that would have been obtained had TBC correctly used the provisions of Annex IV of the Mexican Treaty.

16. In the interest of fairness to competing applicants and other affected parties, and to expedite service to the public, the Commission's "hard look" processing standards adopted in the *Report and Order* in MM Docket 84-750, 50 Fed. Reg. 19936 (1985), specify that applications must be acceptable for filing at the close of the amendment as of right period. The "hard look" processing procedures were intended to place a greater burden on the applicant to make more efficient use of Commission staff and resources in an effort to provide service to the public expeditiously. *See, e.g., R.A.D. Broadcasting Corporation,* 4 FCC Rcd 4772 (1989), *appeal dismissed* No. 89-1413 (D.C. Cir. February 27, 1990). Moreover, the "hard look" procedures state that antenna height and power are evaluated in the course of an acceptability study and that those parameters may be affected by international agreements. Further, the instructions to FCC Form 301 admonish applicants to become familiar with the Commission rules, which make specific reference to the Mexican Agreement. Precedent makes clear that applicants are on notice that the provisions of the international agreements may affect the acceptability of their applications. *See Malkan FM Associates v. FCC,* No. 90-1281 (D.C. Cir. June 14, 1991), *affirming Texas Media group,* 5 FCC Rcd 2851 (1990).

17. Consequently, TBC had notice of the existence of the Mexican Agreement, as well as the responsibility to conform its proposal to the terms of that treaty by the close of the period for filing amendments as of right to insure that its application would be found acceptable for filing. Parenthetically, to accept an amendment at this point in time, after the close of the amendment as of right period, would be unfair to the other applicants in this proceeding who fully complied with our acceptability criteria as of the amendment as of right date. *See, PrimeMedia Broadcasting, Inc.,* 3 FCC Rcd 4293 (1988). Therefore, pursuant to 47 C.F.R. § 73.3566, TCLP's petition to deny will be granted and TBC's application will be dismissed herein as inadvertently accepted for filing.

18. *Los Amigos.* An engineering study of Los Amigos's proposed facility reveals that the proposal is in violation of the U.S.-Mexican Agreement. Specifically, Los Amigos's effective radiated power (ERP) of 2.0 kW and antenna height above average terrain (HAAT) of 112 meters, as proposed in the timely February 21, 1990 amendment, exceed the maximum facilities specified in Annex IV of the U.S.-Mexican Agreement of 1972 for Class A facilities. In order for the proposal to comply with Annex IV, Los Amigos's ERP should be lowered to 1.9 kW. In this case, the discrepancy is not an acceptability defect insofar as the minimal nature of the defect appears attributable to the imprecision inherent in manually

ascertaining from the curves in Annex IV the appropriate ERP/HAAT combination corresponding to the maximum Class A facilities allowed under the U.S.-Mexican Agreement. Therefore, this discrepancy may be resolved by an amendment. *See Domega Broadcasting Corporation*, 4 FCC Rcd 1450(1989). Accordingly, Los Amigos will be required to file an amendment to bring its application in compliance with the U.S.-Mexican Agreement, within 30 days of the release of this Order, with the presiding Administrative Law Judge.

19. *City Boundaries*. On August 6, 1990, TCLP filed a petition to deny the application of Rogers, to which Rogers has filed an opposition and TCLP a reply. TCLP, citing the Commission's "hard look" processing policy, contends that neither application was substantially complete based on its failure to submit a "map depicting the boundaries of Temecula. Indeed, its only showing of even the location of Temecula is its Exhibit..., which is a large-scale contour map upon which Temecula is depicted only as a dot...." Petition at 2. The heart of TCLP's assertion is that, though Rogers's Temecula dot lies well within the 70 dBu contour depicted in its exhibit, the staff must make two assumptions in order to confidently ascertain that Rogers has complied with the city-grade requirements. First, the staff must assume "that the dot lies at the center of the community," and second, "that the outer boundaries of the community do not extend beyond the 70 dBu contour as depicted... The indulgence of such assumptions would be the antithesis of hard look' processing,...." Id.

20. We disagree. An inquiry into the size of the City of Temecula revealed that its population, based on the 1980 census, is 1,783. Opposition at 10. According to Rogers's engineering data, Temecula encompasses 3.4 square miles, based on a review of the U.S. Census map and several others. Id. at 5. This, combined with the fact that "Temecula... at the time of filing... was reflected on routinely available and published maps only with a small dot'," renders as specious TCLP's argument. Id. at 7. Moreover, as the Commission has stated," [w]here exact replications of the community of license's legal boundaries are not possible or provided, the staff deems acceptable those contour maps clearly placing the principal community within the 70 dBU contour." *See, Richard Culpepper*, 5 FCC Rcd 2983, 2985 (1990).[4] The contour map submitted by Rogers met this criteria. Consequently, its application was properly accepted for tender. Therefore, the petition to deny filed by TCLP will be denied.

21. *Environmental Issue*. Our engineering study reveals that, of all the applicants, only Artistic has addressed how it would resolve any RF exposure to workers on its tower. *See* 47 C.F.R. § 1.1307(b). Consequently, we are concerned that each of the others may have failed to comply with the environmental criteria set forth in the *Report and Order* in GEN Docket No. 79-163, 51 Fed. Reg. 14999 (April 12, 1986). *See also, Public Notice*, entitled "Further Guidance for Broadcasters Regarding Radiofrequency Radiation and the Environment" (Released: January 24, 1986). Under the rules, applicants must determine whether their proposals would have a significant environmental effect under the criteria set out in 47 C.F.R. § 1.1307. If an application is determined to be subject to environmental processing under the 47 C.F.R. § 1.1307 criteria, the applicant must then submit an Environmental Assessment (EA) containing the information delineated in 47 C.F.R. § 1.1311. 47 C.F.R. § 1.1307(b) states that an EA must be prepared if the proposed operation would cause exposure to workers exceeding specific standards. Since only Artistic has shown how workers engaged in maintenance and repair on its tower would be protected from exposure to levels exceeding the ANSI guidelines, each of the other applicants will be required to submit the environmental impact information described in 47 C.F.R. § 1.1311. *See generally*, OST Bulletin No. 65 (October, 1985), entitled "Evaluating Compliance With FCC-Specified Guidelines For Human Exposure To Radiofrequency Radiation," at 28.

22. Accordingly, these applicants will be required to file, within 30 days of the release of this Order, an EA with the presiding Administrative Law Judge. In addition, a copy shall be filed with the Chief, Audio Services Division, who will then proceed regarding this matter in accordance with the provisions of 47 C.F.R. § 1.1308. Furthermore, the comparative phase of the case will be allowed to begin before the environmental phase is completed. *See, Golden State Broadcasting Corp.*, 71 FCC 2d 229 (1979), *recon. denied sub nom. Old Pueblo Broadcasting Corp.*, 83 FCC 2d 337 (1980). In the event the Mass Media Bureau determines, based on its analysis of the Environmental Assessments, that the applicants' proposals will not have a significant impact upon the quality of the human environment, the contingent environmental issue shall be deleted, and the presiding judge shall thereafter not consider the environmental effects of the proposals. *See*, 47 C.F.R. § 1.1308(d).

23. *Site discrepancy*. An engineering review of AnnGie's application revealed a discrepancy between AnnGie's site elevation, as represented in its application, and as inferred from a reading of where the transmitter site has been plotted on its topographical site map. The ground elevation at AnnGie's site, as specified in Section V-B, Item 7(a)(1) of its application, is 539 meters (1767') AMSL. However, the elevation of the site at AnnGie's specified coordinates [33^0 30' 37" NL, 117^0 12' 37" WL] is approximately 518 meters (1700 feet) AMSL, as determined from its site map. We find that this site elevation discrepancy does not render AnnGie's application unacceptable for filing since the use of either value, 1767 feet/539 meters or 1700 feet/518 meters, would not cause the proposal to violate the maximum power/antenna height provisions of 47 C.F.R. § 73.211. Additionally, no other rule sections are violated by the site elevation inconsistencies. *See, FPS Broadcasting Group*, 3 FCC Rcd. 3716 (1988). However, we will require AnnGie to amend its application to eliminate the stated discrepancies within 30 days of the release

[4] On September 10, 1990, Rogers filed an amendment "pursuant to § 1.65 of the Commission's Rules to show the proposed station's 3.16 mV/m and 1 mV/m predicted contours relative to the previously unknown legal boundaries of the principal community of Temecula." Her premise was that since the effective date of the incorporation of the City of Temecula was December 1, 1989, and that, according to a signed declaration dated August 27, 1990 by the Deputy City Clerk of Temecula, copies of the official Temecula map were not available for public distribution until "some time after January 1, 1990," it was reasonable that applicants for the Temecula station, whose window closed January 22, 1990, would submit non-uniform city boundaries.

of this Order. In addition, since data on file with the Federal Aviation Administration may be erroneous, an air hazard issue will be specified against this applicant.

24. The applicants below have petitioned for leave to amend their applications on the dates shown. The accompanying amendments were filed after the last date for filing amendments as of right. Under Section 1.65 of the Commission's Rules, the amendments are accepted for filing. However, an applicant may not improve its comparative position after the time for amendments as of right has passed. Therefore, any comparative advantage resulting from the amendments will be disallowed.

APPLICANTS	AMENDMENTS FILED
Spain	6/3/91
TVB	6/19/90
Kimler	8/2/90
AnnGie	10/16/90; 7/8/91
Rogers	9/10/90
TCLP	11/5/90

25. Data submitted by the applicants indicate there would be significant difference in the size of the areas and populations which would receive service from the proposals. Consequently, the areas and populations which would receive FM service of 1 mV/m or greater intensity, together with the availability of other primary aural services in such areas, will be considered under the standard comparative issue for the purpose of determining whether a comparative preference should accrue to any of the applicants.

26. Except as may be indicated by any issues specified below, the applicants are qualified to construct and operate as proposed. Since the proposals are mutually exclusive, they must be designated for hearing in a consolidated proceeding on the issues specified below.

27. Accordingly, IT IS ORDERED, That, pursuant to Section 309(e) of the Communications Act of 1934, as amended, the applications ARE DESIGNATED FOR HEARING IN A CONSOLIDATED PROCEEDING, at a time and place to be specified in a subsequent Order, upon the following issues:

1. If a final environmental impact statement is issued with respect to Spain, Los Amigos, TVB, Kimler, Herron, AnnGie, Avid, Rogers, or TCLP in which it is concluded that the proposed facility is likely to have an adverse effect on the quality of the environment, to determine whether the respective proposal is consistent with the National Environmental Policy Act, as implemented by 47 C.F.R. §§ 1.1301-1319, and, if not, to determine the effect thereof on the respective applicant's basic qualifications to be a Commission licensee.

2. To determine whether there is a reasonable possibility that the tower height and location proposed by AnnGie would constitute a hazard to air navigation.

3. To determine which of the proposals would, on a comparative basis, best serve the public interest.

4. To determine, in light of the evidence adduced pursuant to the specified issues, which of the applications should be granted, if any.

28. IT IS FURTHER ORDERED, That, pursuant to paragraph 3 hereinabove, the applications of New Town and MCI ARE HEREBY DISMISSED.

29. IT IS FURTHER ORDERED, That, pursuant to paragraph 4 hereinabove, the applications of FM Data, TBI, Alexsii, Valley View, and B & M ARE HEREBY DISMISSED.

30. IT IS FURTHER ORDERED, That, pursuant to paragraph 11 hereinabove, Spain, Los Amigos, AnnGie, Rogers, and TCLP must submit an amendment eliminating their short spacing to KTWV-FM or KIKF-FM, or both, to the presiding Administrative Law Judge within 30 days of the release of this Order, with a copy to the Chief, Audio Services Division, respectively.

31. IT IS FURTHER ORDERED, That New Town's petition to deny the applications of Spain, Los Amigos, AnnGie, Rogers, and TCLP IS HEREBY DENIED.

32. IT IS FURTHER ORDERED, That TCLP's petition to deny TBC's application IS GRANTED to the extent indicated herein, and TBC's application IS HEREBY DISMISSED.

33. IT IS FURTHER ORDERED, That pursuant to paragraph 18 hereinabove, Los Amigos shall file an amendment to bring its application in compliance with the U.S.-Mexican Agreement, within 30 days of the release of this Order, with the presiding Administrative Law Judge.

34. IT IS FURTHER ORDERED, That, pursuant to paragraph 20 hereinabove, TCLP's petition to deny Rogers's application IS HEREBY DENIED.

35. IT IS FURTHER ORDERED, That in accordance with paragraph 22 hereinabove, Spain, Los Amigos, TVB, Kimler, Herron, AnnGie, Avid, Rogers, and TCLP must submit the environmental assessment required by 47 C.F.R. § 1.1311 to the presiding Administrative Law Judge within 30 days of the release of this Order, with a copy to the Chief, Audio Services Division.

36. IT IS FURTHER ORDERED, That, pursuant to paragraph 23 hereinabove, AnnGie must submit an amendment eliminating the stated site elevation discrepancies to the presiding Administrative Law Judge within 30 days of the release of this Order.

37. IT IS FURTHER ORDERED, That the petitions for leave to amend filed by Spain, TVB, AnnGie, Rogers, Kimler and TCLP ARE GRANTED, and the corresponding amendments ARE ACCEPTED to the extent indicated herein.

38. IT IS FURTHER ORDERED, That the Federal Aviation Administration IS MADE A PARTY to this proceeding with respect to the air hazard issue only.

39. IT IS FURTHER ORDERED, That a copy of each document filed in this proceeding subsequent to the date of adoption of this Order shall be served on the counsel of record in the Hearing Branch appearing on behalf of the Chief, Mass Media Bureau. Parties may inquire as to the identity of the counsel of record by calling the Hearing Branch at (202) 632-6402. Such service shall be addressed to the named counsel of record, Hearing Branch, Enforcement Division, Mass Media Bureau, Federal Communications Commission, 2025 M Street, N.W., Suite 7212, Washington, D.C. 20554. Additionally, a copy of each amendment filed in this proceeding subsequent to the date of adoption of this Order shall also be served on the Chief, Data Management Staff, Audio Services Di-

vision, Mass Media Bureau, Federal Communications Commission, Room 350, 1919 M Street, N.W., Washington, D.C. 20554.

40. IT IS FURTHER ORDERED, That to avail themselves of the opportunity to be heard, the applicants and any party respondent herein shall, pursuant to Section 1.221(c) of the Commission's Rules, in person or by attorney, within 20 days of the mailing of this Order, file with Commission, in triplicate, a written appearance stating an intention to appear on the date fixed for hearing and to present evidence on the issues specified in this Order. Pursuant to Section 1.325(c) of the Commission's Rules, within five days after the date established for filing notices of appearance, the applicants shall serve upon the other parties that have filed notices of appearance the materials listed in: (a) the Standard Document Production Order (see Section 1.325(c)(1) of the Rules); and (b) the Standardized Integration Statement (see Section 1.325(c)(2) of the Rules), which must also be filed with the presiding officer. Failure to so serve the required materials may constitute a failure to prosecute, resulting in dismissal of the application. *See generally, Proposals to Reform the Commission's Comparative Hearing Process* (*Report and Order* in Gen. Doc. 90-264), 6 FCC Rcd 157, 160-1, 166, 168 (1990), *Erratum*, 6 FCC Rcd 3472 (1991), *recon. granted in part*, 6 FCC Rcd 3403 (1991).

41. IT IS FURTHER ORDERED, That the applicants herein shall, pursuant to Section 311(a)(2) of the Communications Act of 1934, as amended, and Section 73.3594 of the Commission's Rules, give notice of the hearing within the time and in the manner prescribed in such Rule, and shall advise the Commission of the publication of such notice as required by Section 73.3594(g) of the Rules.

FEDERAL COMMUNICATIONS COMMISSION

W. Jan Gay, Assistant Chief
Audio Services Division
Mass Media Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

PR Docket No. 91-322

In the Matter of

Amendment of Part 90 of the Commission's Rules to Permit Exclusive-Use Systems to Conduct Secondary Fixed Tone Signaling and Alarm Operations Without Conforming to the Provisions of Section 90.235. RM-7408

NOTICE OF PROPOSED RULE MAKING

Adopted: October 22, 1991; Released: November 21, 1991

Comment Date: January 13, 1992
Reply Date: January 28, 1992

By the Commission:

I. INTRODUCTION

1. On May 21, 1990, the American Petroleum Institute (API) filed a petition for rule making[1] to enable non-SMR trunked systems above 800 MHz to conduct secondary fixed operations without being subject to the additional conditions currently imposed upon such operations by Section 90.235 of the Commission's rules, 47 C.F.R. § 90.235.[2] In response to API's petition, we are adopting this *Notice of Proposed Rule Making* (*Notice*), to consider rules to relax existing restrictions on secondary fixed tone signaling and alarm operations by all types of private land mobile radio systems that are licensed for exclusive use, including non-SMR trunked systems above 800 MHz.

II. BACKGROUND

2. Section 90.235 provides that private radio land mobile radio licensees authorized under Part 90 of the Commission's Rules, 47 C.F.R. Part 90, may conduct secondary fixed tone signaling and alarm operations above 25 MHz provided certain terms and conditions are met. We recently amended Section 90.637(c) of the Commission's rules to allow trunked Specialized Mobile Radio (SMR) systems and their end users to conduct secondary fixed tone signaling and alarm operations on a less restricted basis without complying with the terms and conditions of Section 90.235.[3] We took this action because those restrictions were intended to reduce interference potential to mobile operations in a shared spectrum environment and were thus unnecessary for trunked SMR systems with exclusive frequency assignments.[4] API's petition proposes rules that would enable trunked non-SMR systems above 800 MHz to conduct secondary fixed operations in the same fashion as trunked SMR systems. API claims that the same reasoning that justified exempting trunked SMR systems from these restrictions applies to trunked non-SMR systems -- specifically, that trunked systems above 800 MHz are licensed on an exclusive basis. Therefore, no useful purpose is served by requiring compliance with restrictions that are responsive to the needs of licensees operating in a shared-use environment.

III. COMMENTS

3. The Association of American Railroads (AAR) "agrees with API that the rationale for permitting relatively unrestricted secondary fixed tone signaling by users of trunked SMR systems, that is, exclusive assignment of frequencies, applies equally" to other 800 MHz trunked systems.[5] The Utilities Telecommunications Council (UTC) supports this proposal. UTC states that "many distribution automation and utility load management functions cannot be accommodated using the short duty cycles" required under Section 90.235. UTC believes that the Commission should reconcile the inconsistency between the fixed operations permitted of trunked SMR systems and those permitted of trunked non-SMR systems at 800 and 900 MHz. This "will permit optimal use of the spectrum, and could, in a small yet significant way, help alleviate the growing demand for spectrum for fixed operations."[6] API's Statement in Reply notes the lack of opposition to this Petition for Rule Making and urges adoption of a rule change without notice and comment proceedings.[7]

IV. DISCUSSION

4. Secondary fixed tone signaling and alarm operations on trunked SMR systems above 800 MHz were exempted from the provisions of Section 90.235 because those provisions were designed to protect other Part 90 base/mobile operations in a shared-use environment. Trunked SMR systems above 800 MHz do not operate in a shared-use environment.[8] They are not, however, the only private land mobile radio systems that operate in an exclusive-use environment. Trunked non-SMR systems above 800 MHz have exclusive use of their assigned spectrum in their

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[1] *See Public Notice*, Report No. 1820 (July 2, 1990), RM-7408.

[2] Section 90.235 includes restrictions relating to bandwidth, output power, type of emission, duration of transmission, use of voice techniques, and automatic deactivation for secondary fixed signaling operations. The provisions relate primarily to protection of co-channel uses from interference on shared channels.

[3] *Report and Order*, PR Docket No. 86-78, 1 FCC Rcd 926 (1986).

[4] *Id.* at paragraph 10.

[5] Comments of AAR at 1.

[6] Comments of UTC at 2-3.

[7] Statement in Reply of the American Petroleum Institute at 1-6. API, UTC and AAR all advocate adoption of the rule changes sought by API without notice and comment.

[8] Trunked SMR systems above 800 MHz have exclusive use of their assigned spectrum in their respective geographic areas based upon fixed mileage separation criteria.

respective geographic areas.[9] Also, a conventional system in the 470-512 MHz frequency band or above 800 MHz can achieve "exclusive-use" single-user status for its assigned frequencies in a geographic area by reason of its mobile loading.[10]

5. The reasons we exempted SMR trunked systems above 800 MHz that conduct secondary fixed tone signaling and alarm operations from complying with the conditions of Section 90.235 are equally applicable to all exclusive-use radio systems conducting those operations. Such systems do not operate on shared spectrum. The only co-channel operations they could affect, therefore, are their own operations. No valid regulatory or public interest objective is achieved by continuing to apply rules intended for a shared-spectrum environment that, when applied in an exclusive-use environment, can only "protect" a licensee from itself. We are therefore proposing rules to permit secondary fixed tone signaling and alarm operations by licensees of exclusive-use systems without imposing the restrictions of Section 90.235 on those operations. The proposed rules regarding such secondary operations by exclusive-use systems would impose only those restrictions necessary to prevent harmful interference and preserve the essentially land mobile nature of the Part 90 services.

V. CONCLUSION

6. The rule changes proposed by API appear to have merit. For the reasons stated above, the premise of API's petition has led us not only to propose the rule changes sought by API, but also to propose rule changes for other similarly-situated exclusive-use land mobile systems. The rule changes proposed are set forth in the attached Appendix.

VI. INITIAL REGULATORY FLEXIBILITY ANALYSIS

7. *Reason for Action.* We are initiating this rule making proceeding to obtain comment on whether it is necessary to continue to impose the restrictions of Section 90.235 upon secondary fixed tone signaling and alarm operations by private land mobile radio systems that are licensed for exclusive use.

8. *Objectives.* We propose to eliminate the requirement that private land mobile radio systems that are licensed for exclusive use comply with conditions imposed by Section 90.235 when conducting secondary fixed tone signaling or alarm operations. This would relieve licensees of these systems, including small businesses, of an unnecessary regulatory burden. The conditions imposed upon secondary fixed tone signaling or alarm operations by Section 90.235 are designed to protect other licensees in a shared-spectrum environment. Private land mobile radio licensees that have exclusive use of their assigned channels do not operate in a shared-spectrum environment.

9. *Legal Basis.* The proposed action is authorized under Sections 4(i), 303(r) and 332(a) of the Communications Act of 1934, as amended, 47 U.S.C. §§ 154(i), 303(r) and 332(a).

10. *Reporting, recordkeeping and other compliance requirements.* No new requirements will be imposed upon licensees in the private land mobile services.

11. *Federal rules which overlap, duplicate or conflict with this rule.* None.

12. *Description, potential impact, and number of small entities affected.* The Commission expects this proposal to provide increased capability for licensees of exclusive-use private land mobile radio systems to meet their communications needs. Although we believe it is too early to estimate the total effect of this proposal, we anticipate that the overall effect on small entities will be favorable. The proposal will permit licensees of exclusive-use private land mobile radio systems to make greater use of secondary fixed tone signaling and alarm operations on already-licensed spectrum to further address their own communications requirements.

13. *Any significant alternative minimizing the impact on small entities and consistent with the stated objectives.* The impact of this proposed rule on existing small entities that are licensed to operate private land mobile radio exclusive-use systems appears to be favorable. The most obvious alternative, to decline to adopt this rule change, would result in continued imposition of what appears to be an unnecessary regulatory burden upon such small entities.

VII. PROCEDURAL MATTERS

14. Authority for issuance of this *Notice of Proposed Rule Making* is contained in Sections 4(i) and 303(r) of the Communications Act of 1934, as amended, 47 U.S.C. 154(i) and 303(r). This is a non-restricted notice and comment rule making proceeding. *Ex parte* presentations are permitted, except during the Sunshine Agenda period, provided they are disclosed as provided in Commission rules. *See generally* 47 C.F.R. §§ 1.202, 1.203 and 1.1206(a).

15. Pursuant to applicable procedures set forth in Sections 1.415 and 1.419 of the Commission's Rules, 47 C.F.R. §§ 1.415 and 1.419, interested parties may file comments on or before **January 13, 1992,** and reply comments on or before **January 28, 1992**. To file formally in this proceeding, you must file an original and five copies of all comments, reply comments, and supporting material. If you want each Commissioner to receive a personal copy of your comments, you must file an original plus nine copies. You should send comments and reply comments to Office of the Secretary, Federal Communications Commission, Washington, D.C. 20554. Comments and reply comments will be available for public inspection during regular business hours in the Dockets Reference Room of the Federal Communications Com-

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[9] *See* 47 C.F.R. § 90.621(c).

[10] The Commission will not assign any given channel in a particular geographic area to additional licensees for conventional use in the frequency bands above 800 MHz if one or more conventional systems operate on that channel with a total of 70 or more mobiles. A single conventional system in these bands can achieve single-user exclusive-use status if it reaches loading of 70 or more mobiles before any other conventional systems have been licensed to operate with any mobiles on the same channel in that area. *See* 47 C.F.R. § 90.633(b). Single-use exclusive use status can similarly be achieved based upon differing loading criteria in the 470-512 MHz frequency band. *See* 47 C.F.R. § 90.313.

mission, 1919 M Street, N.W., Washington, D.C. 20554. For further information contact John J. Borkowski, Land Mobile and Microwave Division, Private Radio Bureau at (202) 634-2443 and Freda Lippert Thyden, Land Mobile & Microwave, Private Radio Bureau at (202) 634-2443.

FEDERAL COMMUNICATIONS COMMISSION

Donna R. Searcy
Secretary

APPENDIX

It is proposed to amend Title 47 of the Code of Federal Regulations, Part 90, 47 C.F.R. Part 90, as follows:

1. The authority citation for Part 90 would continue to read as follows:

Authority: Secs. 4, 303, 331, 48 Stat. 1066, 1082, as amended; 47 U.S.C. 154, 303 and 332, unless otherwise noted.

2. Section 90.235 would be amended by adding a new paragraph (1) to read as follows:

§ 90.235 Secondary fixed signaling operations.

* * * * *

(1) Secondary fixed-tone signaling operations conducted in accordance with the provisions of Sections 90.317(a) or 90.637(c) of this Part are exempt from the foregoing provisions of this Section.

3. A new Section 90.317 would be added to read as follows:

§ 90.317 Fixed ancillary signaling and data transmissions.

(a) Licensees of systems that have exclusive-use status in their respective geographic areas may engage in fixed ancillary signaling and data transmissions, subject to the following requirements:

(1) All such ancillary operations must be on a secondary, non-interference basis to the primary mobile operation of any other licensee.

(2) The output power at the remote site shall not exceed 30 watts.

(3) Any fixed transmitters will not count toward meeting the mobile loading requirements nor be considered in whole or in part as a justification for authorizing additional frequencies in the licensee's mobile system.

(4) Automatic means must be provided to deactivate the remote transmitter in the event the carrier remains on for a period in excess of three minutes.

(5) Operational fixed stations authorized pursuant to the provisions of this paragraph are exempt from the requirements of Sections 90.425 and 90.429 of this Part.

(b) Licensees of systems that do not have exclusive-use status in their respective geographic areas may conduct fixed ancillary signaling and data transmissions only in accordance with the provisions of Section 90.235 of this part.

4. Section 90.637 would be amended by revising paragraph (c) and adding new paragraph (d) to read as follows:

§ 90.637 Restrictions on operational fixed stations.

* * * * *

(c) Trunked and conventional systems that have exclusive-use status in their respective geographic areas may conduct fixed ancillary signaling and data transmissions subject to the following requirements:

(1) All operations must be on a secondary, non-interference basis to the primary mobile operation of any other licensee.

(2) The output power at the remote site shall not exceed 30 watts.

(3) Any fixed transmitters will not count toward meeting the mobile loading requirements nor be considered in whole or in part as a justification for authorizing additional frequencies in the licensee's mobile system.

(4) Automatic means must be provided to deactivate the remote transmitter in the event the carrier remains on for a period in excess of three minutes.

(5) Operational fixed stations authorized pursuant to the provisions of paragraphs (c) and (d) of this Section are exempt from the requirements of Sections 90.425 and 90.429 of this Part.

(d) Conventional systems that do not have exclusive-use status in their respective geographic areas may conduct fixed ancillary signaling and data transmissions only in accordance with the provisions of Section 90.235 of this part.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 88-238

In re Applications of

RONALD SORENSON	File No. BPH-870430MM
MIDWEST RADIO, INC.	File No. BPH-870430MQ
SANTEE BROADCASTING, INC.	File No. BPH-870430MV
Beverly J. Hewitt, Ruth Sirko, et al. d/b/a/ HIGH TOWER PARTNERSHIP	File No. BPH-870430ND

For Construction Permit for a New FM Station, Channel 298C2 (107.5 MHz) at Des Moines, Iowa

MEMORANDUM OPINION AND ORDER

Adopted: November 13, 1991; Released: November 21, 1991

By the Commission:

1. Before the Commission for consideration are a Commission Memorandum Opinion and Order, *Ronald Sorenson*, 6 FCC Rcd 1952 (1991), granting the application filed by Midwest Radio, Inc; a Petition for Partial Reconsideration filed May 9, 1991 by Midwest and a Petition for Reconsideration filed May 10, 1991 by High Tower Partnership.[1]

2. High Tower argues that we erred in fully crediting Midwest's integration proposal. Midwest argues that we erred in declining to grant integration enhancement credit for its principal's sexual orientation. For reasons set forth below, both petitions will be dismissed.

3. The Petitions for Reconsideration are procedurally deficient. Midwest and High Tower have failed to present new facts or changed circumstances as required by 47 C.F.R. § 1.106(b)(2).[2] In addition, the arguments by Midwest and High Tower were considered in our Memorandum Opinion and Order granting Midwest's application. It is well established that we will not grant reconsideration to debate matters upon which we have already deliberated and spoken. *WWIZ, Inc.*, 37 FCC 685 (1964), *aff'd sub nom. Lorain Journal Co. v. FCC*, 351 F.2d 824 (D.C. Cir. 1965), *cert. denied*, 383 U.S. 967 (1966). Thus, the Petitions for Reconsideration will be dismissed as procedurally defective. However, brief comment is warranted on two matters.

4. Midwest's principal and sole voting stockholder, Richard Eychaner, owns both voting and non-voting stock in the applicant. Citing *Cotton Broadcasting Co.*, 4 FCC Rcd 1781 (1989), we concluded that Eychaner's ownership of non-voting stock did not preclude his involvement in Midwest's operation and we fully credited his integration proposal. High Tower argues that Midwest's Articles of Incorporation preclude owners of non-voting shares from active participation in the management of the proposed station. High Tower also asserts that this proceeding is distinguishable from *Cotton* because *Cotton* relied on provisions of state partnership law which authorized general partners to own limited partnership interests without forfeiting their rights and obligations for management of the partnership. High Tower argues that in the absence of a statute similarly authorizing Eychaner to be active in Midwest's management, its Articles of Incorporation must govern and Eychaner is legally precluded from being integrated into Midwest's management.

5. Hightower has cited no Commission precedent or provision of law that prevents an investor from owning both voting and non-voting stock in a corporation. Midwest's two tiered ownership structure is similar to the limited partnership structure considered in *Cotton*. Midwest's Articles of Incorporation provide that:

> The holders of Nonvoting Common Stock shall have no voting powers, rights and privileges, the voting power, rights and privileges being vested solely in the holders of the Voting Common Stock.

Hightower Exh. 7. Thus, the Articles of Incorporation clearly empower Eychaner, as the holder of all voting stock, to control and manage the applicant. While the Articles of Incorporation also prohibit the owners of non-voting stock from involvement in the affairs of the applicant, they do not prohibit voting shareholders from owning non-voting stock and they do not deprive Eychaner of his authority to run the station. The Articles of Incorporation merely insure the insulation of those investors who hold only non-voting interests.

6. Eychaner's non-voting stock is fully attributable to Midwest because it is impossible to provide the insulation required to demonstrate the separation of his two different ownership interests.[3] No purpose, however, would be served by precluding such a stockholder from being integrated into the management of a broadcast facility in his capacity as a voting owner. A refusal to credit the integration of a voting shareholder because he also owns non-voting stock would unduly restrict the capacity of entrepreneurs to organize and finance ownership arrangements. *Cotton*, 4 FCC Rcd at 1782 ¶ 8. Thus, irrespective of whether there is a specific enabling statute, Eychaner is entitled to participate in the management of the applicant as an owner of voting stock, and Midwest is entitled to the credit awarded for the integration of Eychaner's voting interest.

7. Similarly, we are unpersuaded by Hightower's argument that Eychaner's video stores, other businesses and political activities provide another reason to reject his integration proposal. Hightower noted that the ALJ found Eychaner's integration commitment "lacks both permanency and specificity." *Ronald Sorenson*, 4 FCC Rcd 6961, 6964 ¶ 46 (ALJ 1989). The ALJ, was referring to Eychaner's written testimony, which merely promised to curtail his day-to-day involvement in his business activi-

ties. Midwest Exh. 2 p. 2. The ALJ, however, after analyzing the entire record, concluded that Eychaner would be able to fulfill his integration commitment, said that Eychaner's business success led him to believe that Eychaner "would also be a successful broadcaster" and credited Eychaner's integration proposal. 4 FCC Rcd 6965-66 ¶ 62.

8. Although Eychaner currently spends between 40 and 50 hours a week working at his video stores, and he intends to retain his ownership in the stores, he has pledged to end his involvement in the management of those stores. Eychaner will turn over the management of his video stores to Andrew Burton, who is a part owner and a vice president of the video stores. Eychaner testified that it was Burton's idea to open up the video stores, that Burton has been involved with the video stores prior to the opening of their first store, and that they have discussed Burton's taking over the management of the business. Tr. 322. Eychaner stated that Burton could give up some of his current duties by delegating those duties to Keith West. West is also a part owner of the company and has been with the video stores for over three years. Tr. 408. Eychaner further testified that he might hire a controller to handle the company's financial affairs. Tr. 408. Thus, Eychaner has established that he has a viable plan to handle the responsibilities of operating the video stores, allowing him to devote full-time to the operation of Midwest's proposed station.[4]

9. In addition, as previously noted (6 FCC Rcd at 1952 ¶ 4), Eychaner's unrebutted testimony establishes that he spends negligible amounts of time on his other businesses and political activities. Tr. 309-21, 341. In light of the fact that Eychaner's other business and political activities do not interfere with his current full-time involvement with his video stores, there is no basis for finding that those other activities will interfere with his full-time integration commitment for this station. *See Posey County Broadcasting Corp.*, 4 FCC Rcd 8347, 8350 n. 6 (Rev. Bd. 1989), *rev. denied*, 5 FCC Rcd 5745 (1990). Thus, the record supports awarding full credit to Midwest for Eychaner's integration proposal.

10. ACCORDINGLY, IT IS ORDERED, That the Petition for Partial Reconsideration filed May 9, 1991 by Midwest Radio, Inc. and the Petition for Reconsideration filed May 10, 1991 by High Tower Partnership ARE DISMISSED.

FEDERAL COMMUNICATIONS COMMISSION

Donna R. Searcy
Secretary

FOOTNOTES

[1] Also under consideration are Oppositions filed May 22, 1991 by Midwest and May 23, 1991 by Ronald Sorenson; and Replies filed June 3, 1991 by Midwest and June 4, 1991 by High Tower.

[2] Section 1.106(b)(2) provides that reconsideration will only be granted where:

> (i) The petition relies on facts which relate to events which have occurred or circumstances which have changed since the last opportunity to present such matters; or
>
> (ii) The petition relies on facts unknown to petitioner until after his last opportunity to present such matters which could not, through the exercise of ordinary diligence, have been learned prior to such opportunity.

[3] The attribution of Eychaner's non-voting stock, pursuant to *Cotton*, does not affect the outcome of this case. Eychaner owns all 10,125 shares of the issued and outstanding common voting stock and 1,625 shares of non-voting stock, with the remaining 750 shares of non-voting stock, constituting 6 percent of the equity, being held by the only other stockholder. 4 FCC Rcd 6961, 6962 ¶ 10 (ALJ 1989). Thus, whether or not the interest of the other non-voting shareholder is attributed pursuant to *Royce International Broadcasting*, 5 FCC Rcd 7063, 7064 ¶ 9 (1990), Midwest is entitled to credit for the integration of at least 94 percent of its ownership equity. Under *Miracle Strip Communications, Inc.*, 4 FCC Rcd 5064, 5066, ¶¶ 19-20 (1989), a quantitative disparity of less than 12.5 percent in integration proposals is not decisionally significant, and Midwest is still entitled to the preference previously awarded in this case for its qualitative superiority over the only other quantitatively comparable applicant. 6 FCC Rcd at 1954 ¶ 15.

[4] In *Naguabo Broadcasting Company*, 6 FCC Rcd 912 (Rev. Bd. 1991), we rejected an integration proposal where the applicant proposed to hire additional employees to enable him to reduce involvement with his outside businesses, but did not provide a specific and credible plan for accommodating these outside interests with his plan for full-time integration. In that case, the applicant intended to retain his ownership of two profitable businesses, a gas station and sound equipment company. The sound equipment business was a one man operation in which the applicant lined up jobs and hired independent contractors to perform them. The applicant testified that he lived behind the gas station and that he might locate the radio station there. We rejected the applicant's full-time integration proposal because he failed to provide a detailed accounting of his duties and time to show specifically how each business would operate independently in the future. In sum, we found the need for a detailed accounting compelling because the situation readily lent itself to the applicant's continuing involvement in the affairs of his two existing businesses to the detriment of his full-time integration proposal. Here, only one business is involved and, in contrast to the sound equipment business in *Naguabo*, it is operating with a number of experienced employees. More significantly, Eychaner has identified who will take over his management responsibilities for the video stores and has detailed a credible plan as to how delegation to those individuals will permit him to terminate his involvement in the operation of those stores.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 90-153

In re Applications of

SOUND BROADCASTING CO.	File No. BPH-880126ML
MARGARET O. PESCATELLO	File No. BPH-880126OE

For a Construction Permit
for a New FM Station on
Channel 254A in
East Lyme, Connecticut

MEMORANDUM OPINION AND ORDER

Adopted: November 13, 1991; Released: November 21, 1991

By the Commission:

1. Before the Commission for consideration is a petition filed by Margaret O. Pescatello (Pescatello) seeking immediate review of the Review Board's memorandum opinion and order reinstating the application of Sound Broadcasting Co. (Sound) and remanding the proceeding for further hearings on a financial issue specified against Sound and a real-party-in-interest issue specified against Pescatello.[1] *Sound Broadcasting Co.*, 6 FCC Rcd 3626 (Rev. Bd. 1991).

I. BACKGROUND

2. Sound was a general partnership composed of a 50 percent general partner, Eugene Vincellette, and two 25 percent general partners, Nunzia and Laura DeDominicis. Sound sought to amend its application shortly before the hearing to report the withdrawal of Vincellette and to substitute a new general partnership, Sound II, in which the DeDominicis sisters would each be a 50 percent general partner. Sound also withdrew its integration proposal. At the hearing, neither of the DeDominicis sisters was present, although Pescatello had noticed both for cross-examination. Sound's counsel nonetheless offered its single exhibit, naming the DeDominicis as general partners of Sound II and proposing auxiliary power. The ALJ rejected the exhibit, since it lacked a sponsoring witness. In a *Memorandum Opinion and Order*, FCC 91M-1022 (Mar. 12, 1991), issued after the hearing, the ALJ denied Sound's amendment because he believed that Sound II's legal standing was in doubt since it did not demonstrate that Vincellette had voluntarily withdrawn from the partnership. The ALJ dismissed Sound's application for failure to prosecute, granted Pescatello's application, and terminated the proceeding.

3. Sound appealed the dismissal of its application to the Board, pursuant to 47 C.F.R. § 1.301(a)(1). Sound also appealed the ALJ's prehearing denial of its motion to enlarge issues, which sought a real-party-in-interest issue against Pescatello, claiming that Pescatello's application is controlled by her husband, Anthony. The Board held that the ALJ should have accepted Sound's ownership amendment. The Board found that the amendment offered an unrefuted explanation for Vincelette's withdrawal and was supported by the requisite good cause. *See* 6 FCC Rcd at 3627 ¶ 7. The Board also disagreed with the ALJ's dismissal of Sound's application for failure to prosecute. The Board acknowledged that hearing exhibits ordinarily require a sponsoring witness to be received into evidence. The Board found, however, that a written submission was appropriate in light of Sound's withdrawal of its integration proposal which meant that Sound would derive no comparative benefit from the exhibit. Under these circumstances, the Board determined that dismissal of Sound's application was unduly harsh. Accordingly, the Board reinstated Sound's application, as amended, but added a financial issue against Sound II, since Sound's original loan commitment required the guarantee of each of the three original partners.

4. The Board also reversed the ALJ's denial of Sound's petition to enlarge issues.[2] The Board found that Sound had presented substantial and material questions of fact with respect to whether Pescatello's husband Anthony is a real-party-in-interest in her application, that is, whether he has an ownership interest or is or will be in a position to control the operation of the proposed station. The Board determined that Sound had met the burden required for addition of the issue based on a review of Anthony's and Margaret's activities both before and after the filing of the application. *See* 6 FCC Rcd at 3628, ¶¶ 12-13. Accordingly, the Board added a real-party-in-interest issue against Pescatello and remanded the proceeding to the ALJ for further hearings.

5. Pescatello requests a waiver of 47 C.F.R. § 1.115(e)(1), which provides that Commission review of the Board's interlocutory orders will be deferred until the Board makes a final decision in the proceeding. Pescatello asks the Commission to review the Board's action immediately on an interlocutory basis. Pescatello asserts that, if the Commission overturns the Board's addition of the real-party-in-interest issue, the case could be concluded and her application granted, since her application is comparatively superior to that of Sound, which proposes no integration. Pescatello further asserts that it is also appropriate for the Commission to review the Board's reinstatement of Sound's application. Pescatello argues that immediate review would prevent delay and waste of Commission resources since the Board's action requires further hearings concerning both Sound's and Pescatello's applications.

II. DISCUSSION

6. We will deny Pescatello's petition for waiver of 47 C.F.R. § 1.115(e)(1) and will dismiss Pescatello's petition for immediate review of the Board's interlocutory action. A party asking to proceed in a manner other than prescribed by our procedural rules, including 47 C.F.R. § 1.115(e)(1), has a heavy burden of establishing that the resulting disruption of the proceeding is outweighed by compelling and urgent circumstances which could not be

considered by their timely presentation in accordance with those rules. *See Fresno FM Limited Partnership*, 5 FCC Rcd 7261 ¶ 5 (1990). Pescatello has not made such a showing.

7. The cases in which we have granted immediate review of the Board's interlocutory order are readily distinguishable. For instance, *Great Lakes Broadcasting, Inc.*, 6 FCC Rcd 4331 (1991), in which the Commission granted review of the Board's interlocutory order enlarging the issues against an applicant, was based on extraordinary circumstances not present here. In waiving the provisions of 47 C.F.R. § 1.115(e)(1) and vacating the issues added by the Board, we found that the heavy burden of showing compelling and urgent circumstances had been met. We noted that the motion to enlarge issues was grossly untimely, and was based on facts readily discoverable by the moving party. Moreover, based on undisputed facts, the motion was without merit.

8. Here, by contrast, we observe no such patent defects. Rather, review of the Board's ruling on Sound's motion would require a searching -- and procedurally disruptive -- evaluation of Sound's contentions. To the extent that Pescatello contends that the Board erred in its analysis of the record and the relevant case law and therefore should not have added a real-party-in-interest issue against her or reinstated Sound's application, as amended, Pescatello will have ample opportunity to raise these points in a timely filed application for review of the Board's final decision in this case. *See Fresno FM*, 5 FCC 2d at 7261 ¶ 5. [3] As we stated in *Great Lakes Broadcasting, Inc.*, that case should not be interpreted as a lessening of our resolve to discourage interlocutory appeals and to enforce 47 C.F.R. § 1.115(e)(1).[4]

III. ORDERS

9. ACCORDINGLY, IT IS ORDERED, That the Petition for Acceptance of Petition for Immediate Review filed July 12, 1991 by Margaret O. Pescatello IS DENIED and the Petition for Immediate Review filed July 12, 1991 by Margaret O. Pescatello IS DISMISSED.

10. IT IS FURTHER ORDERED, That the Motion to Strike the Petition for Immediate Review filed July 22, 1991 by Sound Broadcasting Co. IS DISMISSED AS MOOT in light of our disposition of this case.

11. IT IS FURTHER ORDERED, That the Motion for Stay of Hearing Proceedings filed August 30, 1991 by Margaret O. Pescatello and Sound Broadcasting Co. IS DISMISSED AS MOOT in light of our disposition of this case.

FEDERAL COMMUNICATIONS COMMISSION

Donna R. Searcy
Secretary

FOOTNOTES

[1] Now pending before the Commission are: (1) Petition for Acceptance of Petition for Immediate Review and Petition for Immediate Review filed July 12, 1991 by Margaret O. Pescatello; (2) an Opposition to the Petition for Acceptance of Petition for Immediate Review and an Opposition to the Petition for Immediate Review filed July 22, 1991 by Sound Broadcasting Co.; (3) a Reply filed July 30, 1991 by Margaret O. Pescatello; (4) a Motion to Strike the Petition for Immediate Review filed July 22, 1991 by Sound Broadcasting Co.; (5) an Opposition to Motion to Strike filed July 26, 1991 by Margaret O. Pescatello; and (6) a Motion for Stay of Hearing Proceedings filed on August 30, 1991 by Margaret O. Pescatello and Sound Broadcasting Co.

[2] In doing so, the Board rejected Pescatello's argument that the ALJ's ruling on the petition to enlarge issues cannot be considered because no Initial Decision had been issued. In this regard, the Board noted that the ALJ's *Memorandum Opinion and Order* under appeal was a final ruling in that it granted Pescatello's application and terminated the proceeding. *See* 6 FCC Rcd at 3628 ¶ 11.

[3] Similarly, *Video 44*, 103 FCC 2d 1204 (1986), *Pacifica Foundation*, 28 RR 2d 674 (1973), and *Communications Satellite Corp.*, 32 FCC 2d 533 (1971), which Pescatello cites in support of her waiver request, are also based on extraordinary circumstances not present here. In *Video 44*, the Commission granted interlocutory review of a Board order adding an obscenity issue *sua sponte* because of the "extremely sensitive" First Amendment considerations involved. FCC 86-16 (Jan. 8, 1986), *cited at* 103 FCC 2d at 1209 n.17. In *Pacifica*, the Commission granted an interlocutory appeal and deleted an issue specified in the hearing designation order that was alleged to be impermissibly vague and clearly unsupported. The Commission, however, summarily rejected the appeal with respect to two other issues, which had been added by the Board. *See* 28 RR 2d 674, 676 ¶¶ 4-5. In *Communications Satellite*, the Commission granted a petition for extraordinary relief by waiving the provisions of 47 C.F.R. § 1.301(b) because the case involved "unique problems of first impression which are difficult to resolve but may be expected to have substantial consequences" and "basic and far reaching considerations of public policy in matters of vital concern relating to the public interest." *See* 32 FCC 2d at 534-35 ¶ 5. None of the special circumstances for allowing an interlocutory appeal in *Video 44*, *Pacifica*, and *Communications Satellite* are present in this proceeding.

[4] We note that the specific changes made in the Commission's hearing reform proceeding did not include altering or abandoning the provisions of Section 1.115(e)(1) that prohibit interlocutory appeals. *See Proposals to Reform the Commission's Comparative Hearing Process to Expedite the Resolution of Cases*, 6 FCC Rcd 157 (1990), *recon. granted in part*, 6 FCC Rcd _____ (May 15, 1991).

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 86-155

In the matter of

SILVER STAR COMMUNICATIONS-ALBANY, INC.

Licensee of Radio Stations
WMJM and WFAV-FM
Cordele, Georgia

Order to Show Cause Why the
Licenses of WMJM and WFAV-FM,
Cordele, Georgia, should not
be revoked

MEMORANDUM OPINION AND ORDER

Adopted: November 13, 1991; Released: November 21, 1991

By the Commission: Chairman Sikes dissenting.

I. INTRODUCTION

1. Before the Commission is a decision of the Review Board holding that Silver Star Communications-Albany, Inc.'s licenses for radio stations WMJM and WFAV-FM, Cordele, Georgia should be revoked. *Silver Star Communications-Albany, Inc.*, 3 FCC Rcd 6342 (Rev. Bd. 1988).[1] Although we agree with the Board's decision in most respects, we disagree with the Board's ultimate conclusion that Silver Star's licenses should be revoked. Rather, we agree with Administrative Law Judge Edward Luton that Silver Star should be assessed a forfeiture of $20,000. *Silver Star Communications-Albany, Inc.*, 3 FCC Rcd 1958 (I.D. 1988).

II. BACKGROUND

2. This revocation proceeding arises from circumstances surrounding Silver Star's acquisition of the two Cordele radio stations. At that time, these stations were owned by James S. Rivers, his son Ronald, and an employee named Sara Howell.

3. The Rivers sought to terminate a renewal proceeding involving the two Cordele stations and commonly-owned stations WTJH, East Point, Georgia, and WJIZ-FM, Albany, Georgia (designated as a result of allegations of misconduct) pursuant to the Commission's minority distress sale policy by selling the stations to a minority-controlled purchaser. *Minority Ownership of Broadcasting Facilities*, 68 FCC 2d 979 (1978), *clarified*, 44 RR 2d 479 (1978).

4. Silver Star's principal, Dr. John Robert E. Lee, was interested in acquiring only WJIZ-FM and intended to sell the three other Rivers-owned stations as quickly as possible. 3 FCC Rcd at 1959 ¶ 8. He therefore proposed to give Ronald Rivers and Sara Howell an option to purchase the Cordele stations. *Id.* at 1959 ¶¶ 9-10.

5. At a prehearing conference, on October 6, 1983, the ALJ presiding over the Rivers' renewal proceeding objected to the option provision. Bureau Exh. 32 at 66-87. The parties then deleted the option provision, reciting that there were no other agreements with Ronald Rivers or Sara Howell. 3 FCC Rcd at 1960 ¶ 12. Satisfied, the ALJ suspended the hearing, and the Mass Media Bureau, acting under delegated authority, approved the distress sale on May 24, 1984. Bureau Exh. 63.

6. Needing additional time to arrange for financing, Silver Star was unable to close under the distress sale until November 30, 1984. 3 FCC Rcd at 6345 ¶ 10. By the time of closing, the Commission had -- on November 8, 1984 -- adopted a rule (47 C.F.R. § 73.3597(a)(1)) requiring that licensees who acquire their stations pursuant to the minority distress sale policy must operate the stations for a year before they may transfer them. *Amendment of Section 73.3597*, 99 FCC 2d 971 (1985). At the closing, the parties executed an agreement under which Ronald Rivers would manage the Cordele stations. *Id.* at 1965 ¶ 61.

7. In early 1985, the Mass Media Bureau began an investigation of the Cordele stations. 3 FCC Rcd at 1963 ¶ 63. This investigation led to the designation of the present revocation proceeding based on allegations that Silver Star had abused the Commission's distress sale policy by secretly agreeing to resell the Cordele stations to the Rivers and that Silver Star in fact transferred control of the Cordele stations without Commission authorization by permitting the Rivers family to regain control of the stations.

III. INITIAL DECISION

8. In his initial decision, the ALJ assessed a $20,000 forfeiture against Silver Star for transferring control of the Cordele stations to Ronald Rivers without Commission approval in violation of 47 U.S.C. § 310(d). The ALJ, however, rejected allegations that Silver Star abused the Commission's distress sale policy by secretly promising the Rivers to sell the Cordele stations to Ronald Rivers. Because he found that the transfer had not been accompanied by misrepresentations, the ALJ concluded that a $20,000 forfeiture was the appropriate sanction.

9. Turning first to the question of a secret agreement, the ALJ found that the record did not show the existence of an actual agreement to sell the stations to the Rivers by clear and convincing evidence. In making this finding, the ALJ reviewed a body of circumstantial evidence, which he found ambiguous. The circumstantial evidence indicated that: (1) Lee was willing, in December 1983, to offer the Rivers a new purchase option to buy the Cordele stations, as a "bargaining chip" for favorable lease terms on a transmitter site (3 FCC Rcd at 1960-61 ¶¶ 16-18); (2) Lee showed little interest in a potential purchaser of the Cordele stations named Donald M. Sutton, Jr. until after the Bureau had begun its investigation of the Cordele stations (3 FCC Rcd at 1960-61 ¶¶ 19-25); (3) a minority shareholder of Silver Star wrote a letter to Lee on October 5, 1984 expressing an understanding that Ronald Rivers was a prospective purchaser of the Cordele stations (3 FCC Rcd at 1961 ¶¶ 26-28); and (4) in January 1985, Lee

was again willing to offer the Rivers an option to purchase the Cordele stations in return for a favorable transmitter site lease (3 FCC Rcd at 1965 ¶¶ 62-63).

10. The ALJ found that this evidence amply demonstrated that Lee was willing to and intended to sell the Cordele stations to Ronald Rivers. 3 FCC Rcd at 1970 ¶ 109. However, he found that this evidence did not show that an actual secret agreement between Lee and the Rivers continued to exist after the deletion of the purchase option from the distress sale. In the ALJ's view, the fact that the contemplated purchase options related to the transmitter site lease were not effectuated contradicted the claim that a "secret, oral agreement. . . surfaced" in written drafts of the options. 3 FCC Rcd at 1969 ¶ 103. Further, the ALJ found that the fact Lee was attempting to use the offer of a purchase option as a "bargaining chip" in the transmitter site negotiations did not establish that an agreement already existed between Lee and Rivers. Similarly, the ALJ believed that the record showed some interest by Silver Star -- although slight -- in Sutton as an alternative prospective purchaser. *Id.* at 1969-70 ¶¶ 99-109.

11. The ALJ also noted that a witness, William Goodson, testified that Lee told him that Lee had agreed to sell the Cordele stations to Ronald Rivers. *Id.* at 1961-65 ¶¶ 30-49. The ALJ rejected Goodson's testimony because he found Goodson to be a biased witness whose demeanor was unpersuasive and uncorroborated. *Id.* at 1970-71 ¶ 113. *See also Id.* at 1964 ¶¶ 48-49, 1972 n.6. Absent probative evidence of an actual agreement, the ALJ did not find abuse of process or other misconduct that would have warranted revocation of license.

12. As an additional matter, the ALJ held that the record did establish by clear and convincing evidence that Silver Star transferred control of the Cordele stations to Ronald Rivers following the distress sale closing on November 30, 1984. Lee testified that after he realized that he could not spin off the Cordele stations immediately as he had planned, he considered Ronald Rivers, who was already serving as the Cordele station manager, as the only realistic choice for interim management. *Id.* at 1965 ¶¶ 60-61. According to the ALJ, Silver Star made no effort to set policies for the Cordele stations, but instead permitted Rivers to run the stations as he had before the closing. *Id.* at 1966 ¶ 75, 1967 ¶¶ 82, 84, 1971 ¶¶ 116-17.

13. Although the ALJ found that an unauthorized transfer of control had clearly occurred, he held that revocation would be appropriate only if it had been concealed through misrepresentation. He found no such deception here, because he found that the transfer of control was not made pursuant to any secret agreement, as the Bureau claimed. *Id.* at 1971 ¶ 119-20.

IV. REVIEW BOARD

14. The Board modified the initial decision and ruled that Silver Star's licenses should be revoked. Preliminarily, the Board held that the ALJ erred in deciding the issues using a clear and convincing evidence standard of proof. In the Board's view, the appropriate standard is a preponderance of the evidence. However, the Board believed that its conclusions were supported by clear and convincing evidence. 3 FCC Rcd at 6348-49 ¶¶ 22-25.

15. As to the merits, the Board found that Silver Star had abused the distress sale policy regardless of whether a secret agreement existed because Silver Star acquired the Cordele stations intending to sell them and then abdicated control over the stations to Ronald Rivers.[2] The Board considered this a subversion of the purposes of the distress sale policy. *Id.* at 6352-53 ¶ 41.

16. The Board affirmed the ALJ's finding that Silver Star had transferred control of the Cordele stations without authorization to Ronald Rivers under the management agreement. The Board agreed with the ALJ that ordinarily the Commission does not disqualify a licensee for an unauthorized transfer of control unless that transfer had been accompanied by deception. Here, however, the Board concluded that Silver Star's "callous abuse" of the distress sale policy was fully as egregious as misrepresentation and that the presence of that factor warranted revocation of Silver Star's licenses. *Id.* at 6354-56 ¶¶ 51-56.

V. DISCUSSION

17. We agree with the ALJ that, in the absence of a finding that Silver Star actually had a secret agreement to transfer control of the Cordele stations to Ronald Rivers, it would be inappropriate to revoke Silver Stars' licenses on the facts of this case. Nonetheless, we find that Silver Star's unauthorized transfer of control constitutes serious misconduct for which an appropriate sanction must be imposed. We therefore affirm the ALJ's decision to impose a $20,000 forfeiture. We believe that this sanction will impress on Silver Star and others the gravity of this violation of the Communications Act.

18. In this revocation proceeding, the Bureau has the burden of establishing by a preponderance of the evidence that serious misconduct occurred.[3] Thus, it is not sufficient to show merely that one could infer the existence of an agreement from the evidence. Rather it must be shown that it is more likely than not that an actual agreement existed. We find that the Bureau failed to meet its burden of establishing by a preponderance of the evidence that Lee had a secret agreement to sell the Cordele stations to Ronald Rivers after deletion of the purchase option from the distress sale in November 1983. For the reasons found by the ALJ and set forth above in paragraphs 10-12, we agree with the ALJ that on the record in this case Lee's precise understanding vis-a-vis the Rivers was at best equivocal.

19. Certainly, Lee expected that ultimately he would attempt to seek Commission approval to resell the Cordele stations to Ronald Rivers. The circumstances of this case, however, make the precise relationship between Lee and the Rivers during the relevant time period ambiguous.[4] At the time (*i.e.*, until shortly before the closing under the distress sale), the Commission had not yet adopted its current rule requiring minority distress sale purchasers to operate their stations for at least a year before reselling. It appears on this record, that the absence of an express prohibition against resale may have created an understandable confusion in Lee's mind about his obligations toward the stations. Apparently, the parties believed that Lee could legitimately expect to negotiate a sale of the Cordele stations to Ronald Rivers after closing, even though the parties had removed the purchase option from the distress sale, because at the relevant time the Commission had not yet placed any explicit restriction on the resale of stations acquired under the distress sale policy. *See* Bureau Exh. 32 at 66 (ALJ); tr. 2390, 2450 (counsel); tr. 193-94, 246-49 (Lee). In view of this uncertainty, we find the record evidence insufficient to establish

the *likelihood* that an actual secret agreement existed, and thus the Bureau has failed to demonstrate that serious misconduct occurred.

20. In the absence of a secret agreement, we conclude that Silver Star's misconduct does not warrant revocation of its licenses. As the ALJ and the Board noted, an unauthorized transfer of control does not necessarily warrant revocation unless it is concealed through misrepresentation or other deception. 3 FCC Rcd at 6355 ¶ 53; *id.* at 1971-72 ¶ 120. In this case -- apart from the question of whether a secret agreement existed -- no deception is apparent. Silver Star's communications attorney testified that Lee consulted him about the management agreement before he entered into it and that the agreement was filed with the Commission. Tr. 2411-12, 2419-22.[5] Absent deception, we find that revocation is not warranted based on the transfer of control by itself, although a lesser sanction is appropriate.

21. As the Board points out, the involvement of the distress sale policy raises further problems here. We agree with the Board that Silver Star's actions tend to undermine the purpose of the distress sale policy because Silver Star acquired the Cordele stations intending to resell them to a non-minority. Silver Star's primary intent, however, was to acquire the Albany station in an entirely legitimate distress sale. Its actions conflicted with the purpose of the distress sale policy because the Albany station was offered only in conjuction with the Cordele stations, which Silver Star did not want and considered of secondary importance. As discussed above, the record indicates that the parties were influenced by the uncertainty as to whether it was permissible to "spin off" the unwanted Cordele stations when they acquired them, and thus they did not exercise due care in managing these stations. Hence, we believe it appropriate to distinguish this case from blatant instances in which a party's intentions are deliberately abusive. Such situations would occur where, for example, a minority's primary intent was to purchase a station at a reduced distress sale price and resell it at full market value, or a where a minority primarily served as a "front" for a nonminority. Because there is no such manifest abusive intent in this case, we believe that revocation is not justified.

22. Although we have concluded that the record before us does not warrant the revocation of Silver Star's licenses, Silver Star's misconduct does call for a substantial sanction to deter Silver Star and other licensees from future misconduct. We therefore impose a $20,000 forfeiture against Silver Star. *See* 47 U.S.C. § 503(b)(2)(A). As we have previously stated, the imposition of this forfeiture represents an appropriate and necessary response to Silver Star's serious violation of the Communications Act.

VI. ORDERS

23. ACCORDINGLY, IT IS ORDERED, That the Mass Media Bureau's Motion to Dismiss filed December 27, 1988 IS DENIED and the Comments of the National Association of Black Owned Broadcasters, Inc. IS ACCEPTED as an amicus brief. *See Cowles Broadcasting, Inc.*, 86 FCC 2d 993, 1018-19 ¶¶ 75-77 (1981), *aff'd sub nom. Central Florida Enterprises, Inc. v. FCC*, 683 F.2d 503 (D.C. Cir. 1982), *cert. denied*, 460 U.S. 1084 (1983).

24. IT IS FURTHER ORDERED, That pursuant to 47 C.F.R. § 1.115(g) the Application for Review filed December 2, 1988 by Silver Star Communications-Albany, Inc. IS GRANTED; and the Request for Briefing and Argument filed December 2, 1988 by Silver Star Communications-Albany IS DISMISSED as moot.

25. IT IS FURTHER ORDERED, That the decision of the Review Board FCC 88R-60 (Nov. 2, 1988) (3 FCC Rcd 6342) IS MODIFIED as set forth above.

26. IT IS FURTHER ORDERED, That Silver Star Communications-Albany, Inc., SHALL FORFEIT to the United States the sum of $20,000 for violations of the Communications Act of 1934 and the Commission's rules as shown in the above memorandum opinion and order. Payment of the forfeiture can be made by mailing to the Commission a check or similar instrument drawn to the order of the Federal Communications Commission. 47 C.F.R. § 1.80(h).

27. IT IS FURTHER ORDERED, That the Petition for Extraordinary Relief filed February 6, 1991 by Silver Star Communications-Albany, Inc. IS DISMISSED as moot.[6]

28. IT IS FURTHER ORDERED, That this proceeding IS TERMINATED.

FEDERAL COMMUNICATIONS COMMISSION

Donna R. Searcy
Secretary

FOOTNOTES

[1] The following pleadings are pending: (1) an Application for Review filed December 2, 1988 by Silver Star Communications-Albany, Inc.; (2) a Request for Briefing and Argument filed December 2, 1988 by Silver Star; (3) the Mass Media Bureau's Opposition to Application for Review filed December 19, 1988; (4) Comments of the National Association of Black Owned Broadcasters, Inc. filed December 19, 1988; (5) the Mass Media Bureau's Motion to Dismiss [NABOB's comments] filed December 27, 1988; (6) a Petition for Extraordinary Relief filed February 6, 1991; (7) the Mass Media Bureau's Opposition to Petition for Extraordinary Relief filed February 19, 1991; and (8) a Petition for Leave to Supplement Petition for Extraordinary Relief and Supplement filed March 29, 1991 by Silver Star.

[2] The Board did not reach the question of whether clear and convincing evidence demonstrated that there was a secret agreement to sell the Cordele stations to Ronald Rivers -- although the Board did find that a preponderance of the evidence indicated that an agreement did exist. *Id.* at 6352 ¶ 40.

[3] We agree with the Board's views as to the standard of proof. For the reasons stated by the Board, the preponderance of the evidence standard -- not the clear and convincing standard -- generally applies to Commission revocation proceedings. 3 FCC Rcd at 6349 ¶ 24. Moreover, we also agree with the Board that the standard of proof is not decisionally significant in this case. Like the Board, we reach the same result -- although one that differs from the Board's -- regardless of the standard of proof used. In revocation proceedings, the burden of proof is on the Commission. 47 U.S.C. § 312(d).

[4] For example, as the the ALJ noted, if Lee and the Rivers already had a firm agreement for Lee to sell the Cordele stations to Ronald Rivers, there would have been no point in Lee offering the Rivers purchase options as a "bargaining chip." *See* 3 FCC Rcd at 1969 ¶ 103, 1970 ¶ 105.

[5] As the Board notes, the Commission's files apparently do not contain a copy of the agreement 3 FCC Rcd at 6358-59 n.44. However, a copy of the ownership report (Form 323) filed by Silver on December 31, 1984 references the agreement.

[6] Silver Star proposes to assign stations WMJM and WFAV-FM to a minority buyer for less than 50 percent of fair market value. Silver Star asserts that extraordinary circumstances warrant permitting a distress sale here, although Silver Star failed to timely elect a distress sale before the commencement of the hearing. Because we have determined that Silver Star's licenses should not be revoked and are terminating this proceeding, Silver Star may seek assignment of its licenses irrespective of the distress sale policy. The Mass Media Bureau may routinely process any such applications in accordance with its ordinarily applicable policies and procedures.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 89-387

In re Applications of

ROXANNE GIVENS	File No. BPH-871202MC
NANCY JEAN PETERSON	File No. BPH-871203MF
SOUTHWEST SUBURBAN BROADCASTING, INC.	File No. BPH-871203MH
CRIMIEL COMMUNICATIONS ASSOCIATES LIMITED PARTNERSHIP	File No. BPH-871203MN
N. WALTER GOINS	File No. BPH-871203NE
JH BROADCAST LIMITED PARTNERSHIP	File No. BPH-871203NF
ANNE M. COUNIHAN	File No. BPH-871203NQ
COVE COMMUNICATIONS	File No. BPH-871203NT

For construction permit for new FM station, Channel 289A, Eden Prairie, Minnesota

MEMORANDUM OPINION AND ORDER

Adopted: November 12, 1991; Released: November 22, 1991

By the Commission:

1. In an order released on May 29, 1991, 6 FCC Rcd 2961, we affirmed an order of the Review Board upholding the ALJ's dismissal of the application of N. Walter Goins based upon a summary judgment that Goins is financially unqualified. We now have before us a consolidated petition for reconsideration and for leave to amend, which Goins filed on June 28, oppositions to the petition filed by Cove Communications, Inc. and JH Broadcast Limited Partnership on July 11, and a consolidated reply filed by Goins on July 23.

2. Goins originally intended to borrow necessary funds from an investment corporation from which he had obtained a letter expressing interest in extending him credit, but he abandoned that plan after the prospective lender informed him in November 1989, two months after this proceeding had been designated for hearing, that it no longer had any interest in pursuing the matter. In an amendment filed in May 1990, Goins represented that he was financially qualified on the basis of his personal net worth. The main asset on which he purported to rely was a claim against a third party that was allegedly enforceable under Minnesota law. We held, in agreement with the Review Board, that he had not made a sufficient showing to establish his financial qualifications. *Id.* at 2691 ¶ 3; 5 FCC Rcd 5371, 5374 ¶¶ 8-9 (Rev. Bd. 1990).

3. Goins now urges us to accept another financial amendment that allegedly dispels doubt as to his financial qualifications and, in light of the information contained in the amendment, to set aside the adverse summary judgment and reinstate his application. Goins argues that he must be credited with diligence in submitting this revised financial proposal because: (a) there was no foreseeable need for this amendment until we affirmed the holding that Goins' prior proposal was defective, as that holding was assertedly "beyond precedent," and (b) Goins tendered the amendment within 30 days of our affirmance of that holding.

4. We do not agree that the amendment has been diligently submitted. The benchmark for measuring timeliness is not, as Goins contends, the release date of the order that he is asking us to reconsider, which was fully consistent with established legal standards,[1] but the point when a substantial and material question first arose as to his financial qualifications, which occurred long before he submitted either of his proposed financial amendments. His initial financial plan was deficient at the outset, as the Board found. 5 FCC Rcd at 5374 ¶ 8. His substitiute proposal of May 1990 was tardy and also patently deficient, as we held previously. His current amendment is still more dilatory. In view of this applicant's previous lack of diligence concerning the requisite showing of reasonable assurance of adequate financing, we need not consider his eleventh hour proposal. *See Aspen FM, Inc.*, 6 FCC Rcd 1602, 1603 ¶ 12 (1991).

5. As there is no good cause for accepting the amendment and as Goins has not shown that there is any error in our order of May 29, there is no reason to reconsider the dismissal of his application.

6. ACCORDINGLY, IT IS ORDERED that the Consolidated Petition for Reconsideration and Petition for Leave to Amend filed by N. Walter Goins on June 28, 1991 IS DENIED.

FEDERAL COMMUNICATIONS COMMISSION

Donna R. Searcy
Secretary

FOOTNOTE

[1] Goins' contention that the decision was contrary to precedent is merely a bald assertion, unsupported by argument or by any citation of prior rulings.

Before the
Federal Communications Commission
Washington, D.C. 20554

In re Application of

FLORIDA CELLULAR MOBIL COMMUNICATIONS CORPORATION — File No. 10854-CL-P-468-A-89

For facilities in the Domestic Public Cellular Telecommunications Radio Service on Frequency Block A, in Market No. 468, Maryland 2 (Kent)

MEMORANDUM OPINION AND ORDER

Adopted: November 12, 1991; Released: November 22, 1991

By the Commission:

I. INTRODUCTION

1. In this order, we address a petition for reconsideration filed by Florida Cellular Mobil Communications Corporation (Florida) in the matter of *Florida Cellular Mobil Communications Corporation*, 6 FCC Rcd 354 (Mob. Serv. Div. 1991) (*Order*).[1] For the reasons discussed below, we deny Florida's petition.

II. BACKGROUND

2. On November 22, 1989, Florida was tentatively selected as the non-wireline winner of a lottery for the Maryland 2 (Kent) RSA.[2] JAJ Cellular Partnership (JAJ) filed a petition to deny, alleging that Florida had violated Section 22.921(b)(1) of the Commission's rules, which prohibits an applicant from having an interest in more than one application for the same Rural Service Area (RSA).[3] The Mobile Services Division (MSD) found that one of Florida's shareholders, Yerger C. Yandell, was also a partner in Kudzu Cellular Partnership, a mutually exclusive applicant in the Maryland 2 market. Consequently, the MSD dismissed Florida's application for its violation of Section 22.921(b)(1). The MSD also denied a companion request by Florida for waiver of Section 22.922 of the rules to allow Yandell to divest his holdings in Florida.[4] *Order*, *supra* at para. 5. Florida now asks that the MSD's action be reconsidered and its application be reinstated.[5] Its petition is opposed by JAJ and Vincent T. Ridikas (Ridikas).[6]

III. DISCUSSION

3. Florida reiterates its previous statements that Yandell, an 0.85% shareholder, failed to receive mailed notification of Florida's plan to pursue RSA authorizations and that Florida did not know that Yandell subsequently made a small investment in Kudzu. Florida adds that it disclosed to the Commission what Yandell had done and requested remedial waivers. Nevertheless, says Florida, the MSD determined that Florida had violated the Commission's cross interest requirements and dismissed its application.

4. Florida now argues that the *Order* mistakenly assumes that the MSD does not have authority to waive the Commission's cellular rules and allow correction of defects that existed in an application on the day of filing. Because of this misconception, Florida says, the MSD failed to take into consideration that the violation was the product of inadvertence, that Florida voluntarily disclosed the violation, or that the action Florida proposed would have served the policy objectives of the rules. Had the MSD done so, submits Florida, it would have found a compelling basis for allowing Yandell to divest his interest in Florida. Instead, Florida argues, the *Order* simply found that no corrective action by the Commission could alter the fact that Yandell violated Section 22.921 and that Florida's application, therefore, was fatally defective under Section 22.20.[7]

5. At the outset, we observe that Florida does not dispute that it violated Section 22.921, and we support the MSD's finding in this regard. The relief requested by Florida necessitates waivers of both Section 22.921 and Section 22.922 of the Commission's rules. Section 22.19 of the Commission's rules establishes the standard applicants must satisfy in order to be granted waivers. Specifically, the rule states that waivers will not be granted except upon a showing that either: (a) the underlying purpose of the rule will not be served, or would be frustrated and that grant of the waiver is in the public interest; or (b) the unique facts and circumstances of the case render application of the rule inequitable, unduly burdensome or contrary to the public interest, and no reasonable alternative is available. *See Northeast Cellular Telephone Company v. FCC*, 897 F.2d 1164 (D.C. Cir. 1990); *see also WAIT Radio v. FCC*, 418 F.2d 1153 (D.C. Cir. 1969). Florida's claim that its violation of Section 22.921 was inadvertently committed by a minority shareholder does not meet either of these two tests. While Florida itself may not have acted intentionally to skew its chances in the lottery, it has made no showing that it took sufficient affirmative steps to ensure that none of its shareholders had filed another application. A rule such as Section 22.921 could not be efficiently applied if a fact-specific analysis of intent were required in particular cases. This would slow implementation of service to the public, contrary to the public interest. Moreover, inadvertent rule violations are hardly unique. Waiving rules for inadvertent violations would seriously undercut general compliance and enforcement efforts.[8] Administrative efficiency and fundamental fairness to those who comply with the provisions of this rule mandates stringent compliance. Likewise, Florida did not satisfy the requirement of Section 22.19 with respect to its request for a waiver of Section 22.922. We note that Section 22.922 is not to be used as a device to escape the consequences of our consistent policy of adherence to the cross-interest prohibition. Moreover, waivers of Section 22.922 generally involve cases in which a carrier would technically violate the rule prohibition by its engagement in a legitimate business transaction totally unrelated to the filing of the cellular application, a situation not presented here. *See Limited Transfers and Assignments of Applications in Rural Service Areas*, 5 FCC Rcd 3265 (1990). The subject case does not present a factual predicate for such a waiver.

IV. CONCLUSION

6. We are not persuaded that the MSD erred in its decision to deny waivers of Sections 22.921 and 22.922 of the rules or in its dismissal of Florida's application. These decisions were consistent with Commission rules and policy. In sum, we affirm the MSD's action taken in the *Order*.

V. ORDERING PARAGRAPH

7. Accordingly, IT IS ORDERED THAT the Petition for Reconsideration filed by Florida Cellular Mobil Communications Corporation IS DENIED.

FEDERAL COMMUNICATIONS COMMISSION

Donna R. Searcy
Secretary

FOOTNOTES

[1] The subject petition for reconsideration has been referred to us by the Chief, Common Carrier Bureau, pursuant to 47 C.F.R. §§ 1.104(b), 1.106(1).

[2] *See* Public Notice Report No. CL-90-51 (released November 24, 1989).

[3] Section 22.921(b)(1) provides, in pertinent part that "[f]or Rural Service Areas, no party to a non-wireline application shall have an ownership interest, direct or indirect, in more than one application for the same Rural Service Area, including an interest of less than one percent."

[4] Section 22.922 provides, in pertinent part that ". . . the sale, transfer, assignment or other alienation of any cellular application to offer service to Rural Service Areas is prohibited . . . ."

[5] Kudzu's application was also dismissed. Kudzu, however, has not sought reconsideration of that action.

[6] Ridikas, like JAJ, was an applicant for the Maryland 2 market. *See* Lottery Notice, Mimeo No. 4350, released September 22, 1989 (Fee No. 9282603). Being a competing applicant whose application would be included in a re-lottey for the Maryland 2 market affords Ridikas standing to participate in this proceeding. *See* Cell South, 2 FCC Rcd 1249 (1987).

[7] Section 22.20(a)(2) provides, in pertinent part, that "[A]n application will be unacceptable for filing and will be returned...if...[it] does not comply with the Commission's rules...."

[8] Ownership as used in Section 22.921(b)(1) is a "general term of recognition of the fact that ownership can vary in degree and kind in different contexts." Algreg Cellular Engineering, 6 FCC Rcd 2921, 2925 (Com. Car. Bur. 1991). We note that the Commission intended to prevent *any* interest, "including . . . less than one percent," by one party in more than one application for an RSA. *See* n.3, *supra*. Cf. Sections 22.921(a) and (b)(1), which permit up to one percent cross-interests in MSAs.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 87-250

In re Applications of

GLOBAL INFORMATION TECHNOLOGIES, INC.	File No. BPCT-861219KG
TEXSTAR COMMUNICATIONS, LTD.	File No. BPCT-870212KM
FRONTIER BROADCASTING, INC.	File No. BPCT-870212KN
FREDERICKSBURG CHANNEL 2	File No. BPCT-870212KP
HAL S. WIDSTEN	File No. BPCT-870212KT
STONEWALL BROADCASTING, INC.	File No. BPCT-870212KU

For a Construction Permit
For a New Television Station
Fredericksburg, Texas

Appearances

Merilyn M. Strailman on behalf of Stonewall Broadcasting, Inc.; *Dan J. Alpert* on behalf of TexStar Communications Ltd.; *Jeffrey D. Southmayd* on behalf of Hal S. Widsten; *J. Brian DeBoice* on behalf of Fredericksburg Channel 2; *James F. Ireland* on behalf of Global Information Technologies, Inc.; *Robert L. Thompson* on behalf of Frontier Broadcasting, Inc.

SUPPLEMENTAL INITIAL DECISION OF ADMINISTRATIVE LAW JUDGE EDWARD LUTON

Issued: November 15, 1991; Released: November 25, 1991

I. PRELIMINARY STATEMENT

1. On June 6, 1990, the Review Board remanded this proceeding for a supplemental hearing concerning the financial qualifications of applicant TexStar Communications, Ltd. ("TexStar").[1] The Board framed the issue to be tried as follows:

> To determine whether TexStar Communications, Ltd. was and is financially qualified to be a Commission licensee.

2. Pursuant to the *Remand Order*, a prehearing conference was held on October 1, 1990, and hearing sessions were conducted on February 19, 20 and 21, 1991. Based on the evidence adduced during the hearing, it is concluded that TexStar was not financially qualified when it filed its application in this proceeding and is not financially qualified today.

II. FINDINGS OF FACT

A. TexStar's Initial Financial Qualifications

3. TexStar's application was filed February 12, 1987. At the time of the original filing, the applicant was an individual, Lesvia Guerra-Cox, doing business under the name TexStar Communications. February 12, 1987 TexStar Application; Tr. 1924 & 1958. Ms. Guerra-Cox signed and certified the entire application on February 11, 1987. *Id.*; Tr. 2178 & 2320. In the application, Guerra-Cox affirmatively certified that she was financially qualified. She said she had estimated it would cost "a minimum" of $3 million "to get the station on the air, and that she had attempted to get assurances for $6 to $8 million. TexStar Ex. R-1 at 1.

4. On the April 7, 1987 B "cut-off" date in this proceeding, TexStar filed an amendment to its application in which a general partnership, TexStar Communications ("TexStar GP"), was substituted as the applicant. April 7, 1987 TexStar Amendment. The amendment stated that Guerra-Cox was a 60% general partner and that Hector Pedregon was a 40% general partner of TexStar GP. *Id.* The amendment was signed by Guerra-Cox as of April 6, 1987, and it reported that all responses in the orginal TexStar application not altered by the amendment, including TexStar's affirmative certification of financial qualifications, "remain unchanged and accurate." *Id.*

5. On January 4, 1988, TexStar filed a Motion for Leave to Amend and Amendment reporting that the applicant entity had again been changed, this time to a limited partnership named TexStar Communications, Ltd. ("TexStar LP"). January 4, 1988 TexStar Amendment. This amendment indicated that TexStar GP was the sole general partner in the new TexStar LP applicant, and that the sole limited partner of the applicant was L.H. Adams Investment, Inc., a company owned by a Texas physician, Dr. Larry H. Adams. This amendment again reported the continuing accuracy of all information in the original TexStar application not changed by the amendment, including the applicant's initial certification of financial qualifications. The Amendment was signed by TexStar GP general partner Hector Pedregon as of December 30, 1987.

6. On January 22, 1988, during the discovery conducted prior to the initial phase of this proceeding, Ms. Guerra-Cox was deposed and testified that the "sole source" of TexStar's financing was NBC Bank.[2] Guerra-Cox was asked during the January 1988 deposition if she had spoken to any other financial institutions regarding financing for TexStar, and she responded that she had not done so prior to filing the TexStar application on February 12, 1987.[3]

7. During her February 1988 hearing testimony in the prior phase of this proceeding, Ms. Guerra-Cox again testified that TexStar's sole source of financing was NBC

Bank.[4] Guerra-Cox further testified that the assurance of financing from NBC Bank was embodied in a February 10, 1987 letter from NBC Bank. Tr. 317-18 & 331.

8. On February 18, 1988, applicant Stonewall Broadcasting, Inc. ("Stonewall") filed a Motion to Enlarge Issues seeking a financial issue against TexStar. That Motion alleged, in general terms, that TexStar did not have reasonable assurance of financing from NBC Bank, because a subsequent letter of that bank indicated that no such assurance had been given.[5] In TexStar's March 10, 1988 Opposition to Stonewall's Motion, TexStar again reiterated that its certification of financial qualifications was based solely on the February 10, 1987 NBC Bank letter.[6] The Opposition further reaffirmed Ms. Guerra-Cox's earlier testimony that TexStar had not sought financing from any source other than NBC Bank.[7]

9. In Contingent Exceptions to the *Initial Decision* in this proceeding, Stonewall contended before the Review Board that a financial issue should have been added against TexStar as a result of Stonewall's Motion to Enlarge Issues.[8] In response, TexStar's August 31, 1989 Consolidated Reply to Exceptions again reiterated, in language materially identical to that of the earlier TexStar Opposition, that TexStar's financial certification was based solely on the February 10, 1987 NBC Bank letter and that TexStar had not sought any additional or alternative sources of financing to support its financial qualifications in this proceeding.[9]

10. During her hearing testimony in this remand phase, Guerra-Cox once again acknowledged that the prospective loan from NBC Bank described in the February 10, 1987 NBC Bank letter had been the sole basis for her February 1987 certification of TexStar's financial qualifications. Tr. 2328 & 2332. Guerra-Cox also admitted that NBC Bank was the only financing source on which TexStar had relied during the period between the February 12, 1987 filing date and the January 1988 dates of her initial phase deposition. Tr. 2180, 2184, 2187 & 2333. Guerra-Cox stated that she had relied solely on NBC Bank during that period because NBC Bank was the only bank from which she had obtained a written assurance letter. Tr. 2328 & 2332.

11. Guerra-Cox further testified that, shortly after the initial phase depositions in January of 1988, she "started having trouble reaching" Mr. Lutz, the banker at NBC Bank who had provided her with the February 10, 1987 NBC Bank letter. Tr. 1946-47 & 2192. She said that she had wanted at the time to inform Lutz that the TexStar applicant had become a limited partnership, and that she became "worried" when Mr. Lutz refused to see her or take her phone calls. Tr. 2190, 2195, 2242 & 2354. She therefore sought and obtained, she stated, a letter from her personal banker, Mr. Ed Guzman of First Republic Bank. *Id.*[10] This First Republic Bank letter is dated January 28, 1988. TexStar Ex. R-2 at 5. After obtaining the First Republic letter, Guerra-Cox was successful in obtaining an additional letter from Mr. Lutz of NBC Bank. Tr. 2358-60. That letter is dated February 18, 1988, and acknowledges TexStar's change to limited partnership status. *Id.*; TexStar Ex. R-5.

12. During her remand hearing testimony, Ms. Guerra-Cox gave differing accounts of when she first began to rely on either the January 1988 First Republic Bank letter or other "oral" assurances she claimed to have received from that bank. Her prepared written testimony stated that she had relied on the First Republic Bank letter from the time it was issued on January 28, 1988, until mid-February of 1990, when she learned from Mr. Guzman that the bank had adopted new regulations which cast doubt on the continuing validity of the letter. TexStar Ex. R-1 at 4; Tr. 2243-45. During her testimony on cross-examination, however, Guerra-Cox stated that she had never relied on assurances from First Republic Bank, either written or oral, until approximately the summer of 1990, when her legal counsel told her that the Commission had changed its rules and would now permit applicants to rely on verbal assurances from a bank. Tr. 2189-90 & 2193. When confronted with the inconsistency between her prepared statement and her testimony on cross-examination, Guerra-Cox initially sought to hedge, saying she "may have" or "could have" relied on First Republic Bank prior to mid-1990, but that her "key" reliance had been on NBC Bank prior to that time. Tr. 2191 & 2194. She then attempted to reaffirm her prepared written testimony by claiming that, after the date of the January 1988 First Republic Bank letter, she had indeed relied on First Republic Bank, as well as on NBC Bank, in support of TexStar's financial qualifications. Tr. 2195. She was then confronted with her February 24, 1988 initial phase hearing testimony, in which she had stated that TexStar was relying solely on the NBC Bank letter. Tr. 2209; see Tr. 331 (Stonewall Ex. R-18 at 8). Faced with that prior testimony, Guerra-Cox retracted her claim of 1988 reliance on First Republic Bank and agreed that, as of February 1988, she had been relying solely on NBC Bank. *Id.*[11]

13. Later in her remand hearing testimony, Guerra-Cox claimed that she "had always relied" on First Republic Bank "from the inception." Tr. 2217. She then claimed that she "began to rely" on First Republic only after it had issued the January 28, 1988 letter, but that she had relied on "both" First Republic and NBC Bank subsequent to that time. Tr. 2333-34. Upon again being shown her February 24, 1988 hearing testimony stating that NBC Bank was TexStar's only financing source, Guerra-Cox once again retracted her claims of early reliance on First Republic Bank and admitted, for the second time, that, as of February 24, 1988, NBC Bank was the sole source on which TexStar had relied for financing. Tr. 2337-38.

14. In a Motion for Production of Documents filed by Global Information Technologies, Inc. ("Global") on October 30, 1987, TexStar was requested to produce "all documents pertaining to the participation of TexStar's principals in securing financing for the proposed station," including any after-acquired or subsequently created documents. Stonewall Ex. R-5 at 5 & 15.[12] In response to this request, TexStar produced a heavily redacted version of the February 10, 1987 NBC Bank letter[13] (and a subsequent letter of NBC Bank), but it did not produce a copy of the January 28, 1988 First Republic Bank letter. Tr. 2195-2206. Guerra-Cox testified that, so far as she knew, TexStar had made no reference to any prospective loan from First Republic Bank, or to any reliance by TexStar on any such prospective loan, prior to TexStar's response to the Review Board's January 26, 1990 Order requiring TexStar to produce an unexpurgated copy of the February 10, 1987 NBC Bank letter. Tr. 2217.[14] Prior to March 7, 1990, the date on which TexStar responded to the Board's *Production Order* by producing the full text of the NBC Bank letter, the record in this proceeding contains no mention by TexStar of any reliance on, or assurance of financing from, First Republic Bank. Prior to that date,

the record reflects only the uniform claims of TexStar and its principals that TexStar's sole source of financing was NBC Bank. *E.g.*, Stonewall Exs. R-16, R-17, R-18, R-19 & R-20; FC2 Exs. R-6 & R-7.

15. The February 10, 1987 NBC Bank letter which TexStar produced pursuant to the Review Board's *Production Order* states, in most pertinent part, that NBC Bank was "seriously interested in exploring ways in which we could assist you in meeting your financial needs." FC2 Ex. R-8; Tr. 2618. The letter contains no language which could be thought, by any reasonable construction, to provide assurance of the availability of a loan to TexStar. *Id.* By its terms, the letter simply expresses NBC Bank's "interest" in discussing the possibility of a future loan. *Id.*[15] The letter also states that the bank had "not reviewed the financial information required by us to fully consider a loan commitment." *Id.* TexStar never provided NBC Bank with any financial statements or other pertinent fiancial information regarding either its principals, Guerra-Cox and Pedregon, or the TexStar partnership entity itself. Tr. 2326 & 2604.

16. TexStar produced no witnesses and offered no evidence during the remand hearing to support the validity of its prior reliance on a prospective loan from NBC Bank. Instead, TexStar stipulated that it no longer desires to rely on NBC Bank in support of its initial financial qualifications. Tr. 2271 & 2281. In lieu of reliance on NBC Bank, TexStar now seeks to rely on alleged "oral assurances" which it claims Guerra-Cox received from First Republic Bank prior to the filing of TexStar's application. *Id.* In short, TexStar now seeks to establish its financial qualifications, as of the time it certified those qualifications in its application, not by reference to the only funding source on which it actually relied at that time, but rather through reliance on an entirely different source -- one on which TexStar, by its own repeated admissions, placed no actual reliance, either when it certified its financial qualifications or, (at a bare minimum) for more than one year thereafter.

17. At the remand hearing, Guerra-Cox testified that she made a number of trips to First Republic Bank in January of 1987 on business unrelated to the TexStar application. Tr. 1896-1902. During these visits, Guerra-Cox testified, she had at least "eight or nine" conversations with First Republic Bank Vice President Guzman about her application. Tr. 1900-01 & 1904-05. Guerra-Cox showed Guzman a feasibility study which she had prepared in connection with a prior FCC application in which she had been involved. Tr. 1909-11, 1939 & 2156; Stonewall Ex. R-10. That study contained projected cost and revenue information, as of April 1985, for a UHF television station operating on Channel 60 and licensed to San Antonio, *Id.* It did not contain information relating to a VHF station operating on Channel 2 and licensed to Fredericksburg, and Guerra-Cox did not provide Guzman with any comparable information relating to Channel 2. *Id.*; Tr. 1921-22, 1939, 1963-64, 2221-22 & 2225-26.

18. Guerra-Cox testified that she told Guzman orally that the station she was applying for was a Fredericksburg VHF station which would be "infinitely" more valuable, would have a "much stronger" signal and would "do as well or better" and be "more viable" than the station that was the subject of her feasibility study. Tr. 1913, 1919-22, 1936-38, 1941, 2153-54 & 2224-26. She also told Guzman, she testified, that the Channel 2 facility would serve Fredericksburg, San Antonio and Austin, and could "very easily go on cable." Tr. 1913-14, 1917-18, 2153-54, 2158-59, 2224-26 & 2316; see also Tr. 2464. Both San Antonio and Austin are located at the outer edge of the Grade B service area of TexStar's proposed facility, and portions of both cities are beyond TexStar's predicted Grade B contour.[16]

19. During the conversations, Guerra-Cox told Guzman that NBC Bank was providing her with a financing letter for her application. Tr. 1912, 1936-37 & 1943. According to Guerra-Cox, Guzman "assured" her that First Republic Bank would also be "interested" in a similar involvement with the venture. Tr. 1909. Guerra-Cox also testified that Guzman told her "some of the things . . . that would be involved *if* his bank was willing to lend us this money." Tr. 1957 (emphasis supplied). In general, Guerra-Cox testified that Guzman merely told her to "keep me apprised of this because we have the same lending capacities that NBC has, we can offer you the same type of deal . . . and offer you the same thing that any other bank can." Tr. 1943.

20. Guerra-Cox initially testified that Guzman also offered to give her a letter, but that she declined the offer because she had already made arrangments for a letter from the NBC Bank. Tr. 1946. She later testified, however, that Guzman never offered to give her a letter, but rather offered "his assurances that he wanted to do the same type of deal that [NBC Bank] was doing," Tr. 1953. Later still, Guerra-Cox testified that Guzman had offered "to furnish me a similar letter" to the one being supplied by NBC Bank. Tr. 2160. According to Guerra-Cox, however, Guzman never asked her what was in the NBC Bank letter, and she never told him the terms of that letter. Tr. 2162-63.

21. Mr. Guzman testified that he recalled approximately two conversations with Ms. Guerra-Cox in January of 1987 which related to the TexStar application. Tr. 2427 & 2433. He stated that he was "positive" the conversations occurred during January of 1987, because he recalled that they had occurred at a particular branch of First Republic Bank, a branch which was subsequently moved to another location. Tr. 2448-49. When asked when this move occurred, he said it happened sometime in 1988, and that he had been at the location where he recalled having had the conversations with Guerra-Cox during the entire calendar year 1987 and also for some portion of 1988. *Id.*

22. Guzman later testified that he was "positive" that the initial conversations with Guerra-Cox relating to TexStar occurred "in January or early February " of 1987. Tr. 2538-39. When again asked how he could be positive of that fact, Guzman said that the initial conversations had occurred "a long time before" Guerra-Cox asked him to issue the January 28, 1988 First Republic Bank letter. Tr. 2539. He agreed, however, that the initial conversations could have occurred in the latter part of February of 1987, although he continued to maintain that they could not have occurred in March. Tr. 2539-40. Guzman acknowledged that he did not know whether his initial conversations with Guerra-Cox had occurred before or after the TexStar application was filed on February 12, 1987. Tr. 2566. He stated that Guerra-Cox did not tell him during the initial conversations whether or not her application had been filed. *Id.*

23. Guzman exhibited imperfect recollection, and gave inconsistent testimony, about other aspects of his conversations with Guerra-Cox. He testified, for example, that Guerra-Cox's San Antonio Channel 60 feasibility study

was "definitely not" what Guerra-Cox had showed him, because the material she had given him concerned a VHF station that covered Fredericksburg, San Antonio and Austin. Tr. 2429-30, 2450 & 2452. He later retracted this testimony, stating that he did not know whether or not the Channel 60 study was in fact what Guerra-Cox had given him. Tr. 2530.[17] Guzman also testfied that, after Guerra-Cox gave him the feasibility study, he did not review it prior to his next conversation with her. Tr. 2433. He later testified, however, that he "would have" reviewed the study on the afternoon of the day he received it. Tr. 2465-66. Still later, Guzman testified that he only "briefly looked at" the study and then "left it aside." Tr. 2540. Guzman also testified that the information Guerra-Cox provided to him indicated the land for the station's transmitter site would be purchased, and that his bank would not have been interested in the project if the transmitter site was to have been leased. Tr. 2454-56. TexStar's plans have always involved a lease, and not a purchase, of the proposed transmitter site. Tr. 1955 & 2341-44.

24. Guzman testified that his verbal "assurance" to Guerra-Cox occurred during the first conversation which they had relative to her application. Tr. 2542.[18] Guzman further testified that his first conversation with Guerra-Cox lasted only about 15 or 20 minutes, and that he did not review the written materials which Guerra-Cox had given him during the course of that conversation or, thus, prior to giving the so-called "assurance." Tr. 2431, 2433 & 2465-66. The amount of the loan involved in the "assurance" was, Guzman said, in excess of $8 million. Tr. 2422 & 2450. At the time, the lending limit of Guzman's bank branch was approximately $500,000, and the largest loan which Guzman's bank had ever made to Guerra-Cox was an auto loan for less than $12,000. Tr. 2413, 2467 & 2495. Guzman characterized Guerra-Cox's personal financial resources as "modest." Tr. 2488.[19]

25. Guzman also testified that he had never been involved with a start-up loan to a television station, had never given an "assurance" in connection with any other such loan, and had no experience whatsoever in lending money to television stations. Tr. 2467 & 2469. Guzman acknowledged that he knew nothing about Guerra-Cox's knowledge or experience, or lack thereof, in the field of broadcasting, and he also testified that First Republic Bank would not have entertained a start-up loan to an individual who had no experience in the relevant business field. Tr. 2426 & 2517. Guzman admitted that he knew nothing about the nature of the proposed TexStar station's coverage area, or the number of competing media outlets in the market, or the financial condition of the other stations in the market, or the programming projected for the station, or the status of the station with respect to carriage on local cable systems. Tr. 2461-64, 2472-73, 2511-12 & 2550-51. Guzman stated that no effort on his part to investigate such matters had been "called for" by the dealings he had with Guerra-Cox. Tr. 2460 & 2500.

26. Regarding the actual nature of the verbal "assurance" which he gave, Guzman testified that Guerra-Cox

> came in and she told me, she told me that she was putting this project together or she had put it together and that she wanted me to look at some information that she had. And that's what I did. I briefly looked at and left it and then left it aside, because there was no loan request. . I can't remember specifically what the conversation was about.

Tr. 2540-41. Guzman said that nothing else happened during his initial meeting with Guerra-Cox, and that he said nothing further to her at the meeting "because it wasn't a request for anything." Tr. 2541-42. The so-called verbal "assurance," Guzman said, "was given to the extent that I knew what the project was about and I knew the bank wanted large loans and [I] encouraged her to consider us. . . . [I] told her that if she got what we needed that we would then give her, if it was satisfactory, we would give her an approval." Tr. 2542. Guzman told Guerra-Cox nothing more, he testified, than what it "might take" for her to get a loan from his bank. Tr. 2543-44.

27. Guzman also testified that First Republic Bank desired to make "large loans," such as the $8 million loan to TexStar, "if at all possible," by which he said he meant if the borrower could satisfy the bank's reasonable and ordinary credit criteria. Tr. 2533, 2555 & 2565-66. Guzman freely acknowledged, however, that he had no idea at the time of his conversations with Guerra-Cox whether she (or TexStar) could satisfy such criteria. *Id.* Guzman also testified that he had mentioned various "typical terms" for prospective loans to Guerra-Cox, Tr. 2490-91, but that the verbal "assurance" which he had provided contained no loan terms. Tr. 2525. The importance which Mr. Guzman attached to the matter of the so-called verbal "assurance" is illustrated by the response he gave when asked about the difference between a written and a verbal "assurance":

> GUZMAN: There's no difference but what good would a verbal assurance do to anyone? . . . I don't think anyone could find comfort in having a verbal assurance.

Tr. 2468.

28. TexStar's claim that it obtained a supposedly meaningful verbal "assurance" from First Republic Bank prior to the filing of its application is also in direct conflict with the sworn testimony of TexStar's principals given during the inital phase of this proceeding. As stated earlier, Guerra-Cox testified during the initial phase that she had *not* spoken with any fiancial institutions other than NBC Bank regarding financing for her proposed station at any time prior to the filing of TexStar's application. Stonewall Ex. R-16 at 3.[20] Indeed, during the prior phase of this proceeding, Ms. Guerra-Cox was specifically asked why she had *not* spoken with Mr. Guzman of First Republic Bank about potential financing, and she responded not by stating that she had in fact spoken with Guzman, but rather with an explanation of why she had preferred to consult with NBC Bank.[21]

29. Hector Pedregon also testified, during the prior phase of this proceeding, that Guerra-Cox had not consulted with any financial institution other than NBC Bank in connection with prospective financing for TexStar's application prior to the time the TexStar application was filed.[22] Pedregon further testified that, as of approximately March 17, 1987, Guerra-Cox had not mentioned to him the existence of any potential source of financing other than NBC Bank.[23] Guerra-Cox testified at

the remand hearing that she did not recall telling Pedregon prior to April of 1987 that she had obtained any form of assurance from any financing source other than NBC Bank. Tr. 2323. In addition, Pedregon testified that he was taken by Guerra-Cox to meet Guzman during the summer of 1987, and that there was no discussion at that meeting of any potential financing or financial "assurance" from First Republic Bank. Tr. 2576-78.

30. During redirect examination at the remand hearing, Guerra-Cox attempted to explain her prior testimony that she had consulted no financing sources other than NBC Bank prior to filing her application by claiming she had believed at the time that she was only being asked about institutions which had provided written assurances. Tr. 2352. She claimed, in particular, that she was "solely keying in" on the NBC Bank letter when she gave the testimony in question, because that was the only written assurance she had obtained. Tr. 2362. The specific prior testimony as to which she made this claim is:

> Q. And had you spoken to some -- any other financial institutions regarding --
>
> GUERRA-COX: Not with this application at its inception or when I filed. *But since then*, as a matter of fact, I've had -- *my local bank* has asked me to let them know what's going on because they have an interest and we're keeping our options open for, you know --

Stonewall Ex. R-16 at 3 (Guerra-Cox Dep. at 69) (emphasis supplied). When asked to identify what "local bank" she had referred to in her answer, Guerra-Cox admitted that she had been referring to Guzman and First Republic Bank. Tr. 2361. She was then asked why, if she had been "solely keying in" on the "written assurance" of the NBC Bank letter when she answered the question, she had stated in her answer that she had had *oral discussions* with First Republic Bank *subsequent to, but not before* the application was filed. Faced with this question, Guerra-Cox ran out of explanations and answered, in obvious discomfort, "I don't recall." Tr. 2362-63.

31. Pedregon, on the other hand, did not take serious issue with his prior testimony. Tr. 2606-16. He testified at the remand hearing that he had no specific recollection of Guerra-Cox having mentioned to him potential financing sources other than NBC Bank, and that his prior testimony appeared to be accurate. *Id.*

B. TexStar's Current Financial Qualifications

32. In support of its current financial qualifications, TexStar relies on neither NBC Bank nor First Republic Bank, but rather on a $3.75 million loan from the First National Bank of Kerrville (hearafter "Kerrville Bank"). TexStar Ex. R-1 at 5. The prospective loan is evidenced by a letter dated March 1, 1990 from the Kerrville Bank signed by William Goertz, the bank's President. TexStar Ex. R-4.

33. TexStar obtained the March 1, 1990 Kerrville Bank letter as a result of the following circumstances. Prior to the letter's issuance, in approximately February of 1990, Dr. William Rector, a Kerrville physican, telephoned Kerrville Bank President Goertz and asked him to meet with TexStar principals Pedregon and Guerra-Cox to consider a request which they had. Tr. 1978-79. Dr. Rector is in medical partnership in Kerrville with TexStar's limited partner, Dr. Larry Adams, and he told Goertz he was calling on behalf of both himself and Adams. Tr. 2025-26, 2324 & 2604. Rector was present at each of the four to six 1987 meetings between Guerra-Cox, Pedregon and Adams that led to the formation of the TexStar limited partnership. Tr. 2325 & 2604. Both Rector and Adams are customers of the Kerrville Bank. Tr. 1979, 2006, 2026 & 2028.

34. To accommodate Rector's request, Goertz agreed to meet with Pedregon and Guerra-Cox. Tr. 2044. He met initially only with Rector and Pedregon, not with Guerra-Cox. Tr. 1978 & 2595. In a subsequent meeting, Goertz met with Guerra-Cox and Pedregon. Tr. 1980 & 2597. At that February 1990 meeting, Guerra-Cox and Pedregon provided Goertz with the same April 1985 feasibility study relating to a UHF station on Channel 60 licensed to San Antonio which Guerra-Cox had earlier provided to First Republic Bank. Tr. 2598. At no time did TexStar or its principals provide the Kerrville Bank with any personal financial information on Guerra-Cox or Pedregon, or with any financial information on the TexStar Partnership. Tr. 1984-85, 1990-92, 2000, 2002, 2257, 2326 & 2602.

35. TexStar did provide Goertz, however, with a form letter for use in preparing the letter which the Kerrville Bank ultimately issued. Tr. 2008-09. The March 1, 1990 Kerrville Bank letter is similar or identical in many respects to the January 28, 1988 letter issued to TexStar by First Republic Bank; as to such similarities, it appears that the Kerrville Bank letter is based on the form TexStar provided. Tr. 2008-10 & 2019-23; see TexStar Ex. R-2 at 5; TexStar Ex. R-4.[24] TexStar also specified to the Kerrville Bank that its letter should recite the $3.75 million loan amount which appears in the March 1, 1990 Kerrville bank letter. Tr. 1996-98. That amount exceeds by approximately $2.25 million the Kerrville Bank's legal lending limit, which is (and was on March 1, 1990) approximately $1.5 million. Tr. 1998 & 2028.

36. The prospective loan described in the Kerrville Bank letter is contingent on, among others things, the condition that

> all reasonable and ordinary credit criteria of the First National Bank of Kerrville are met at such time as you (a) have received the license to operate said station and (b) request from the First National Bank of Kerrville a formal lending commitment.

Texstar Ex. R-4 at 1. Kerrville Bank President Goertz testified that the referenced "reasonable and ordinary credit criteria" of the bank would require the submission of financial information on the applicant and its principals, cash flow information, tax returns, information on the scope of the project and the types of collateral available, information regarding equity and repayment terms and other matters. Tr. 1992-93 & 2010-11. Goertz testified that he had not been provided with any of this information either before the March 1, 1990 letter was issued or at any subsequent time. Tr. 1992-93, 2002 & 2011; see also Tr. 2254-56 & 2268. Goertz therefore acknowledged that, on the date the letter was written (and continuing through the date of his testimony at the remand hearing), he had no idea whether TexStar could satisfy his bank's reasonable and ordinary credit criteria or, consequently, whether or not his bank would be willing to make a $3.75 million (or any other) loan to TexStar. Tr. 2024 & 2034-40.

37. Goertz also conceded that he had neither experience with making loans to television stations or knowledge of the television industry. Tr. 1993 & 2030. He agreed that the March 1, 1990 Kerrville Bank letter was simply an "expression of interest" on the part of the bank made in accordance with the letter's terms. Tr. 2051. Goertz also agreed that it had been his desire to "accommodate" TexStar's request for the letter to the extent that he could. Tr. 2045. He did not recall engaging in any negotiations over the various loan terms set forth in the letter. Tr. 2045. He did recall, however, that TexStar limited partner (and Kerrville Bank customer) Larry Adams had thanked him for his assistance after the letter was issued. Tr. 2027.

38. The Kerrville Bank letter also states that the prospective loan is further contingent upon

> the approval of correspondent bank or banks of First National Bank of Kerrville to fund any portion of the outstanding loan that exceeds the legal lending limit of First National Bank of Kerrville. Communication has been held with correspondent banks regarding this application.

TexStar Ex. R-4 at 1. As noted above, the prospective $3.75 million loan exceeds the Kerrville Bank's legal loan limit by approximately $2.25 million. Tr. 1998 & 2028. Mr. Goertz testified that he had discussed the prospective loan with one potential correspondent bank and had been informed by that bank that "upon receipt of a formal application, they would consider that application along with the customer in the ordinary course of their credit policy and consider it also as an overline application on the part of First National Bank." Tr. 1999-2000. Goertz acknowledged that the potential correspondent bank had thus merely "expressed an interest in learning more" about the matter, and had done no more than that. Tr. 2001. At the time of his conversation with the potential correspondent bank, as at all other pertinent times, Mr. Goertz had no financial informaton on either TexStar or its principals, or any of the other information necessary to determine compliance with the Kerrville Bank's applicable credit criteria. Tr. 2000. Goertz did not, therefore, provide any such information to the potential correspondent bank. Tr. 2000.

III. CONCLUSIONS OF LAW

A. TexStar's Initial Financial Qualifications

39. TexStar has abandoned any reliance on NBC Bank or the February 10, 1987 NBC Bank letter in support of its initial financial qualifications. Because TexStar no longer relies on NBC Bank, it cannot be found initially qualified as a result of the NBC Bank letter or any other communications it received from NBC Bank. In addition, the language of the NBC Bank letter itself and TexStar's failure to provide any pertinent financial information to NBC Bank render the NBC Bank letter patently insufficient to establish a reasonable assurance of the availability of financing. *See, e.g., Capital City Community Interest, Inc.*, 2 F.C.C. Rcd. 1984, 1986 (1987) ("willingness to further review" proposed loan request is not sufficient); *Shawn Phalen*, 5 F.C.C. Rcd. 53, 54, *clarified*, 5 F.C.C. Rcd. 2622 (Rev. Bd. 1990) (a "fundamental loan understanding" must exist, and a "mere invitation to solicit an ordinary loan application" is not sufficient); *Marlin Broadcasting of Central Florida, Inc.*, 4 F.C.C. Rcd. 7945, 7947 (Rev. Bd. 1989), *recon. denied*, FCC 90R-1 (rel. Jan. 22, 1990) (bank must have been provided with sufficient information on the assets and financial position of the applicant to enable it to determine that the applicant "passed initial muster for a loan" and is "willing, *and able*, to meet all of the lender's requirements"); *see also Pontchartrain Broadcasting Company, Inc.*, 4 F.C.C. Rcd. 5245, 5246-47 (Rev. Bd. 1989); *JAM Communications*, 4 F.C.C. Rcd. 3754, 3757 (Rev. Bd. 1989); *Dutchess Communications Corp.*, 101 F.C.C. 2d 243 (Rev. Bd. 1985); *Christina Communications*, 2 F.C.C. Rcd. 1971, 1974 (C.C. Bur. 1987).

40. TexStar argues that it had received an oral assurance of financing from the First Republic Bank prior to the time it filed its application. But as TexStar has repeatedly acknowledged throughout this proceeding, its original proposal -- the one which underlies its initial affirmative certification of its financial qualifications in its application -- relied *solely* on a prospective loan from NBC Bank, as evidenced by the February 10, 1987 letter of that bank. It appears that TexStar's original financial proposal involved no reliance whatsoever on any assurance from First Republic Bank. TexStar's original financial proposal was plainly deficient; it possessed no reasonable assurance from NBC Bank.

41. Absent a finding that TexStar's proposal as originally formulated was in fact valid, Commission precedent forbids TexStar from shifting its reliance from the only source on which it did rely to a source on which it concedely did *not* rely at the relevant time. *See, e.g., Aspen FM, Inc.*, FCC 91-68 at 2-3 (rel. March 21, 1991) (the applicant's "original financial proposal at the time of certification" must be found valid before subsequent changes in the proposal will be allowed); *Pepper Schultz*, 5 F.C.C. Rcd. 3273, 3273 (1990) (applicant whose original financial proposal was deficient due to its own lack of diligence may not subsequently seek to alter the proposal and must be disqualified); *Opal Chadwell*, 4 F.C.C. Rcd. 1215, 1217 (1989), *recon. granted on other grounds sub nom. Dorothy O. Schultz*, 5 F.C.C. Rcd. 3227 (1990) (validity of applicant's original financial proposal must be established before reliance on a new proposal will be permitted); *Coastal Broadcasting Partners*, 5 F.C.C. Rcd. 734, 734-35 (Rev. Bd. 1990) (absent grant of a good cause amendment, the only relevant issue is what "exactly [the applicant's] financial proposal was at the time of certification."

42. With respect to the alleged oral assurance from the First Republic Bank, TexStar principal Lesvia Guerra-Cox knew that such an oral assurance was not sufficient for Commission purposes. Tr. 2190-91; *Las Americas Communications, Inc.*, 1 FCC Rcd. 786, 788 (Rev. Bd. 1986). TexStar argues that the prohibition against oral assurances was effectively overruled in *Northampton Media Associates*, 4 FCC Rcd. 5517, 5518-19 (1989). Since at the time of *Northampton, supra*, Guerra-Cox was experiencing difficulty in communicating with Mr. Lutz of the NBC Bank, TexStar sought to breathe life into what it claims was First Republic's earlier assurance. The result was Mr. Guzman's assurance letter to TexStar dated January 28, 1988.

43. The *Northampton* decision was released on July 13, 1989. TexStar's original financial proposal involving reliance on NBC Bank was still very much at issue in this proceeding when the *Northampton* decision was handed

down. One month after *Northampton* was released, Stonewall filed its Contingent Exceptions with the Review Board arguing that a financial issue against TexStar was warranted due to the inadequacy of TexStar's NBC Bank letter.[25] Nearly two months after *Northampton* became the law, TexStar expressly argued to the Review Board that Stonewall's Exceptions should be rejected because *the sole financing source for TexStar's application, NBC Bank*, had provided TexStar with adequate assurances.[26] Two months after *Northampton*, TexStar continued expressly to represent to the Commission that it had *never sought assurances* from any financial source other than NBC Bank and that it was *not relying* on any source other than NBC Bank. *Id.*

44. Having maintained its consistent posture of exclusive reliance on NBC Bank well after the pertinent "change in Commission law" which it now seeks to invoke in its defense, TexStar cannot be heard to contend that the *Northampton* case somehow salvages its deficient initial qualifications. Because the sole source on which TexStar relied has proved inadequate, TexStar's initial financial qualifications are inadequate. Its tardy attempt to rely on First Republic Bank cannot be accepted. *Aspen FM, Inc., supra*; *Pepper Schultz, supra*; *Opal Chadwell, supra*; *Coastal Broadcasting Partners, supra*. TexStar says:

> "Although TexStar has been unable to establish the validity of its initial reliance on NBC Bank, it is not estopped from relying upon showing [sic] it had additional resources to finance its proposal, assuming it had its alternative financing plan from the outset. *Willie A. Jefferson*, 6 FCC Rcd. 1499, 1501 (Rev. Bd. 1991).

TexStar's claim that Guerra-Cox "relied" on First Republic's oral assurance makes no sense. "Reliance" bespeaks intent. But at the time First Republic's oral assurance is said to have been given, Guerra-Cox *knew* that such an assurance was inadequate for her own and for Commission purposes. TexStar had no intention of relying on the First Republic Bank at the time of certification. TexStar's contrary argument reduces Guerra-Cox's claimed "reliance" to an absurdity.

45. With reference to *Willie A. Jefferson, supra*, TexStar's focus is on certain language having to do with an "alternative" financing plan. What the Review Board said in *Jefferson, supra*, is this:

> "We have agreed with [the applicant] that it should not be collaterally estopped from showing that Foster has the resources to finance this proposal, assuming [the applicant] had an alternative financing plan from the outset of relying solely on a loan from Foster."

Nothing there helps TexStar. TexStar can be viewed as having had an "alternative financing plan from the outset" only if it is believed that Guerra-Cox, in good faith, "relied" on an assurance which she *knew* was inadequate when given.

46. Even if TexStar were to be allowed at this late date to shift its initial reliance from NBC Bank to the alleged pre-filing "assurance" of First Republic Bank, the ultimate result would not be altered. The so-called verbal "assurance" which Mr. Guzman gave to Guerra-Cox plainly amounted to no more than an expression of First Republic Bank's "interest" in receiving a loan application from Guerra-Cox. The descriptions of the alleged verbal "assurance" which Guerra-Cox herself gave during her remand phase testimony indicate that Mr. Guzman merely expressed an "interest" in the matter, and Guzman himself stated that the so-called "assurance" merely "encouraged [Guerra-Cox] to consider us" and informed her that "*if* she got what we needed . . . [and] *if* it was satisfactory, we would give her an approval," Tr. 2542 (emphases added). As Guzman acknowledged, and as the circumstances under which the so-called "assurance" was given in any event make quite plain, Guzman had no idea at the time whether Guerra-Cox could supply what was "needed" and what would be "satisfactory" to support an eight million dollar (or any other) loan. He therefore told her only that his bank was "interested," and "encouraged her to consider" seeking financing from his bank.

47. The "reasonable assurance" standard requires more than this. Applicants must demonstrate that they have "passed initial muster for a loan, and that unless circumstances have changed, a loan is almost certainly forthcoming." *Marlin Broadcasting of Central Florida, Inc.*, 4 F.C.C. Rcd. at 7947, *citing Dutchess Communications*, 101 F.C.C.2d at 246 n.4. In particular, applicants must provide the potential lender with financial and other information sufficient to demonstrate that they are "willing, *and able*, to meet all of the lender's requirements with respect to collateral, guarantees, and capital investment by the lendee." *Marlin Broadcasting of Central Florida, Inc.*, 4 F.C.C. Rcd. at 7947; *see, e.g., Shawn Phalen*, 5 F.C.C. Rcd. at 53-54. These requirements were not even remotely satisfied with respect to the so-called "verbal assurance" upon which TexStar now seeks to rely. Rather, the so-called "verbal assurance" was "clearly no more than a routine invitation to apply for a potential loan; it [gave] absolutely no assurance of the positive reception of any such application, 'reasonable' or otherwise." *Marlin Broadcasting of Central Florida, Inc.*, 4 F.C.C. Rcd. at 7947. The misdescribed "assurance" is therefore inadequate, as a matter of law, to establish reasonable assurance of financial qualifications.

48. In addition, a preponderance of the evidence indicates that the alleged verbal "assurance" did *not* occur prior to the filing of TexStar's application on February 12, 1987. Although Guerra-Cox adamantly maintained in her remand hearing testimony that the "assurance" was given in January of 1987, this testimony was in direct conflict with testimony which Guerra-Cox gave during the initial phase of this proceeding. At that time, Guerra-Cox testified that she had consulted only with NBC Bank, *not* with any other potential financing source, *including in particular First Republic Bank*, prior to filing her application. Stonewall Exs. R-16 & R-17. Guerra-Cox provided no satisfactory explanation for this conflict between her prior and her current hearing testimony. The context and obvious purport of the prior testimony clearly belies the unconvincing efforts which Guerra-Cox made to reconcile her past testimony with her current claims. Particularly unconvincing was Guerra-Cox's claim that she had thought her verbal dealings with Mr. Guzman were "irrelevant" to her prior testimony when, in fact, the very prior testimony in question *expressly refers* to her verbal discussions with Guzman and states that those discussions occurred *after* her application was filed. Stonewall Ex. R-16 at 3.

49. Guzman himself was unable to give a convincing explanation for his professed "positive" recollection that the relevant conversation had occurred during January or February of 1987, and he ultimately conceded that the conversations could in fact have occurred in the latter part of February, after TexStar's application was filed. The record also reflects that, as late as March and April of 1987, Guerra-Cox had made no mention whatsoever to her soon-to-be partner, Hector Pedregon, of any purported verbal "assurance" from First Republic Bank, or indeed of any potential financing source for the application other than NBC Bank.

50. A preponderance of the evidence thus indicates that Guerra-Cox discussed her application with Guzman *after* the application was filed, not before. It is concluded that Guerra-Cox's discussions with Guzman did not occur until after the only relevant time -- the time prior to the filing of TexStar's application. Thus, even had the discussions been adequate to evidence reasonable assurance, and even were they deemed legally relevant at this stage of the proceeding, they still would not establish TexStar's initial financial qualifications, because they did not occur before TexStar filed its application.

51. Because TexStar was not financially qualified at the time it filed its application, it is unqualified to receive a grant. Its application must be denied. *Marlin Broadcasting of Central Florida Inc.*, 4 F.C.C. Rcd. at 7947-48; *see, e.g., Aspen FM, Inc., supra*, FCC 91-68 at 2-3; *Pepper Schurtz*, 5 F.C.C. Rcd. at 3273; *Dutchess Communications Corp.*, 101 F.C.C.2d at 244-52.

B. TexStar's Current Fiancial Qualifications

52. TexStar's reliance on the Kerrville Bank and the May 1, 1990 Kerrville Bank letter in support of its current financial qualfications is no better founded. TexStar never supplied the Kerrville Bank with any of the financial or other information necessary to the bank's basic consideration of a loan request, including even elementary information such as the financial statements of TexStar and its partners. The Kerrville Bank's letter expressly conditioned any future loan to TexStar on prior satisfaction of all "reasonable and ordinary credit criteria" of the bank, and Bank President Goertz testified that none of the information necessary to ascertain compliance with the bank's criteria had been submitted, and that the bank therefore had never ascertained whether or not TexStar could satisfy any of its lending criteria. The record thus makes it plain that, as with NBC Bank and First Republic Bank before it, the Kerrville Bank never determined whether TexStar had "passed initial muster for a loan" and was "willing, *and able*, to meet all of [the bank's] requirements." *Marlin Broadcasting of Central Florida, Inc.*, 4 F.C.C. Rcd. at 7947. Like the prior NBC Bank letter and the First Republic Bank "assurance," the Kerrville Bank's letter is merely one more "expression of interest" in soliciting a future loan application, as Kerrville Bank President Goertz himself effectively conceded during the remand hearing. Tr. 2051. TexStar therefore obtained no reasonable assurance of financing from the Kerrville Bank. *Marlin Broadcasting of Central Florida, Inc.*, 4 F.C.C. Rcd. at 7947.

53. The Kerrville Bank letter is inadequate to support TexStar's current financial qualifications for an additional reason. The Kerrville Bank will require the participation of a correspondent bank in order to fund nearly two-thirds of the prospective $3.75 million loan. The bank's March 1, 1990 letter expressly states that the prospective loan is contingent upon the approval of a correspondent bank, and no reasonable assurance has been obtained of the willingness of any potential correspondent bank to provide the approximately $2.25 million "overline" amount that is beyond the Kerrville Bank's legal loan limit. *Id.* As Kerrville Bank President Goertz testified, the only communication from a correspondent bank which has been obtained amounts to a mere "expression of interest in learning more" about the matter. Tr. 2001.

54. Where participation by a correspondent bank is required, reasonable assurance of the willingness of the correspondent bank to make the loan must be obtained. *E.g., CBS, Inc.*, 49 F.C.C.2d 1214, 1228-29 (Rev. Bd. 1974), *recon. denied*, 51 F.C.C. 2d 651 (Rev. Bd. 1975), *rev. denied*, FCC 75-1281 (rel. Nov. 25, 1975); *KIST Corp.*, 99 F.C.C.2d 173, 178-81 (Rev. Bd. 1984), *rev. granted in part on other grounds*, 102 F.C.C.2d 288 (1985). A mere "expression of interest" by a potential correspondent bank is clearly insufficient to satisfy the "reasonable assurance" requirement. *Marlin Broadcasting of Central Florida, Inc., supra*. TexStar's reliance on the Kerrville Bank is thus, for two separate reasons, misplaced. TexStar is not currently financially qualified. Were TexStar not already disqualified due to its lack of initial financial qualifications, its application would be denied due to its lack of current financial qualifications.

IV. CONCLUSION

55. IT IS ORDERED THAT, the application of TexStar Communications, LTD., IS DENIED, because TexStar was not financially qualified when it filed its application and remains financially unqualified today, the designated issue is resolved against TexStar on both counts. TexStar is not qualified to be a Commission licensee.[27]

FEDERAL COMMUNICATIONS COMMISSION

Edward Luton
Administrative Law Judge

FOOTNOTES

[1] *Global Information Technologies, Inc.*, 5 F.C.C. Rcd. 3385 (1990) (hereafter " *Remand Order* ").

[2] The pertinent Guerra-Cox testimony is as follows:

> Q. So, in terms of your participation in securing financing, the NBC Bank was the sole source of that financing --
>
> GUERRA-COX: Uhm-Hum.
>
> A. -- up until recently?
>
> GUERRA-COX: Yes.
>
> TEXSTAR COUNSEL: Excuse me. Objection to the extent that you say until recently. It still is the sole source of financing, I believe according to the testimony that's been given.
>
> GUERRA-COX: Yeah.
>
> Q. So, it is your sole source of financing, the NBC Bank.

GUERRA-COX: Yeah, ...

Stonewall Ex. R-16 at 3 (Guerra-Cox Dep. at 69).

[3] The pertinent testimony is:

Q. And had you spoken to some -- any other financial institutions [other than NBC Bank] regarding --

GUERRA-COX: Not with this application at its inception or when I filed.

Stonewall Ex. R-16 at 3 (Guerra-Cox Dep. at 69).

[4] The pertinent prior hearing testimony is:

Q. In your depostion testimony, you also testified that this particular February 10th [NBC Bank] letter . . . was your sole financing source. Is that correct?

GUERRA-COX: That's correct for the construction and operation -- the three-month operation of the station.

* * *

Q. But you indicated Mr. Pedregon, himself, has not been involved in obtaining any financing or anything of that nature:

He's basically just aware of these steps that you have taken?

GUERRA-COX: Mr. Pedregon, on his own, has explored various possibilities for additional financing in the, I believe, Fredericksburg area; but our sole basis for contruction and assurance for the funds for the operation of the station are the NBC [Bank] letter.

Tr. 317-18 & 331 (Stonewall Ex. R-18 at 4-5 & 8).

[5] February 18, 1988 Stonewall "Motion to Enlarge Issues Against TexStar Communications, Ltd." at 4-7.

[6] TexStar's Opposition stated, in pertinent part:

TexStar's certification is based upon a letter to TexStar from NBC Bank of San Antonio, Texas, dated *February 10*, 1987. Cox Dep. Tr. 69.

Stonewall Ex. R-19 at 2-3 (emphasis in original).

[7] The TexStar Opposition stated:

As was repeatedly testified to during depositions, TexStar has specifically *not* sought alternative sources of financing, *e.g.*, from limited partners, due to the fact that it had *already* secured an assurance from a financial institution to support the requirement that it obtain a "reasonable assurance" of the availability of funds to construct and initially operate its proposed station prior to filing its application. [Footnotes omitted].

Stonewall Ex. R-19 at 2-3 (emphasis in original); see Tr. 2214-15.

[8] August 10, 1989 Stonewall "Contingent Exceptions and Supporting Brief" at 39-48.

[9] Stonewall Ex. R-20 at 4 (TexStar August 31, 1989 "Consolidated Reply of TexStar Communications, Ltd. to Exceptions" at 9); see Tr. 2215-16.

[10] The bank for which Mr. Guzman worked changed names several times. It was initially known as First Republic, then later as InterFirst, and was ultimately acquired by NCNB Bank. Tr. 1897, 2174 & 2405. For simplicity, it is referred to here as First Republic.

[11] Guerra-Cox expressed the view that, because she had "begun with" exclusive reliance on NBC Bank, it had been "cleanest" and "most appropriate" for her to continue to rely solely on NBC Bank. Tr. 2209.

[12] The Global Motion was granted, insofar as is pertinent here, by *Order*, FCC 87M-293 (released Nov. 18, 1987).

[13] The letter, as produced, contained nothing but the letterhead, the date and the addressee. The entire text and even the signature were deleted. Global Ex. 5 (initial phase exhibit).

[14] The Board ordered TexStar to produce both the NBC Bank letter and any other evidence which might bear on the validity of the alleged NBC Bank assurances upon which TexStar had placed its exclusive reliance up to that time. *Global Information Technologies, Inc.*, 5 F.C.C. Rcd. 535, 536 (Rev. Bd. 1990) (hereafter " *Production Order* ").

[15] The letter concludes, "we recommend you file a formal loan application with our Bank so that we may further our discussion regarding your financial needs." FC2 Ex. R-8.

[16] December 23, 1987 TexStar Amendment, Figure 4; see also February 12, 1987 TexStar Application, Figure 2; Tr. 1915-16; Stonewall Ex. R-15.

[17] The Channel 60 study clearly was what Guerra-Cox gave to Guzman.

[18] In other portions of his testimony, Guzman expressed some uncertainty about when -- or whether -- he had actually provided Guerra-Cox with an oral "assurance." He testified, for example, that he "thought" he "probably" had given Guerra-Cox an "assurance" before he issued the January 28, 1988 letter. Tr. 2468. He also testified that he "thought" he had given the "assurance" during the first conversation he had with Guerra-Cox. Tr. 2468 & 2473-74.

[19] The only Guerra-Cox financial statement of record, a March 1988 joint statement for Guerra-Cox and her husband, reflects a net worth of $130,000, of which approximately $90,000 consisted of various cash assets of TexStar Commuications, Ltd. which were improperly reflected on the statement as personal assets of Guerra-Cox. Tr. 2260-61 & 2290-91; Stonewall Ex. R-22. The record also reflects that, during 1989, Guerra-Cox used in excess of $6,000 of TexStar's cash assets to pay off a personal loan obligation which she and her husband owed to First Republic Bank. FC2 Ex. R-3; Tr. 2288-2304; see also Stonewall Ex. R-21; Tr. 2232-38.

[20] This same contention was expressly reiterated by TexStar, no less than twice, in pleadings submitted to the Commission in an effort to defeat the addition of a financial issue. Stonewall Exs. R-19 at 2-3 & R-20 at 4.

[21] The pertinent prior testimony is:

Q. What bank is Mr. Ed Guzman with?

GUERRA-COX: He's with InterFirst, First Republic InterFirst/First Republic.

Q. Is there some reason you did not consult Mr. Guzman instead of Mr. Lutz in connection with your financing in this proceeding?

GUERRA-COX: That I didn't discuss what?

Q. That you didn't consult Mr. Guzman, instead you consulted Mr.Lutz in connection with your financing in this proceeding.

GUERRA-COX: Well, NBC Bank has a prior letter on file because of my involvement with Channel 60; they were aware of my past involvement. And it was Mr. Don Tello, who was with InterFirst Republic, had moved to Austin or to Washington, D.C. at InterFirst. And I just -- I felt very comfortable with NBC; they'd been great in working with me in the past.

Stonewall Ex. R-17 at 2-3 (Guerra-Cox Dep. at 502-03).

[22] The pertinent testimony reads:

Q. Can you tell me what your knowledge is with respect to how the NBC Bank letter came to or the NBC Bank came to issue this letter to TexStar Communications? Just how did this come about?

PEDREGON: Mrs. Cox deals with that bank, has in the past, and that's the one she decided to go to for the letter.

Q. Did she -- do you happen to know whether she went to any other sources as potential financiers?

PEDREGON: At this time, no.

Q. This is the only one you know of that she went to?

PEDREGON: This is the only one I know of.

FC2 Ex. R-6 at 3 (Pedregon Dep. at 96)

[23] The pertinent testimony is:

Q. Did she mention whether she had any particular entities in mind with regard to potential loans?

PEDREGON: We -- no. Only that I knew already that she had a letter from the bank for the monies needed. Now, that in time would become a loan I suppose.

Q. Other than that, though, you don't recall any specific possible entities that would be loaning money to Channel 2?

PEDREGON: No.

FC2 Ex. R-7 at 1-2 (Pedregon Dep. at 72-73); see Tr. 2613.

[24] Among the similarities is the phrase "present intention" or "present firm intention" used in the two letters to describe the bank's intent. TexStar E. R-2 at 5; TexStar Ex. R-4. Goertz testified that this language was not something he would normally put into a letter of this type. Tr. 2056; see also Tr. 2016.

[25] August 10, 1989 Stonewall "Contingent Exceptions and Supporting Brief" at 39-40.

[26] Stonewall Ex. R-20 at 4 (TexStar August 31, 1989 "Consolidated Reply of TexStar Communications, Ltd. to Exceptions" at 9).

[27] In the event exceptions are not filed within thirty (30) days after the release of this Supplemental Initial Decision, and the Commission does not review the case on its own motion, this Supplemental Initial Decision shall become effective fifty (50) days after its release pursuant to Section 1.276 (d) of the Commission's Rules.

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

GTE HAWAIIAN TELEPHONE COMPANY, INC. — File No. I-T-C-91-209

Application for authority to acquire and operate facilities for direct service between Hawaii and the Cook Islands.

ORDER, AUTHORIZATION AND CERTIFICATE

Adopted: November 15, 1991 Released: November 22, 1991

By the Chief, International Facilities Division:

1. Upon consideration of the above-captioned uncontested application, filed pursuant to Section 214 of the Communications Act of 1934, as amended, IT IS HEREBY CERTIFIED that the present and future public convenience and necessity require the provision of direct international message telephone service (IMTS) between Hawaii and the Cook Islands by GTE Hawaiian Telephone Company, Inc. (HTC).

2. Accordingly, IT IS ORDERED that application File No. I-T-C-91-209 IS GRANTED, and HTC is authorized to:

a. lease from Comsat and operate five voice-grade satellite circuits between the Sunset, Hawaii earth station and an appropriate INTELSAT satellite over the Pacific Ocean, connecting with similar circuits between the satellite and an earth station in the Cook Islands furnished by HTC's correspondent, Telecom Cook Islands, Ltd.;

b. lease from GTE Spacenet Corp. and operate five voice-grade circuits in the Sunset earth station; and

c. use said facilities to provide HTC's regularly authorized services between the U.S. and the Cook Islands.

3. The Commission retains jurisdiction over this matter to reallocate circuits in the satellite system among the various international common carriers and other authorized users as required to ensure nondiscriminatory use of, and equitable access to, the communications satellite system.

4. No material changes inconsistent with this or any other relevant Commission order shall be made before final execution of an operating agreement between the applicant and its correspondent, and a copy of the agreement shall be filed with the Commission within 30 days of its execution.

5. IT IS FURTHER ORDERED that the applicant shall file a tariff pursuant to Section 203 of the Communications Act, 47 U.S.C. Section 203, and Part 61 of the Commission's Rules, 47 C.F.R. Part 61, for the service authorized in this Order.

6. IT IS FURTHER ORDERED that the applicant shall file the annual reports of overseas telecommunications traffic required by Section 43.61 of the Commission's Rules, 47 C.F.R. §43.61.

7. IT IS FURTHER ORDERED that the applicant shall file semi-annual circuit reports pursuant to Section 63.10(b) of the Commission's Rules, 47 C.F.R. Section 63.10(b).

8. This order is issued under Section 0.291 of the Commission's Rules and is effective upon adoption. Petitions for reconsideration under Section 1.106 or applications for review under Section 1.115 of the Commission's Rules may be filed within 30 days of the date of public notice of this order (*see* Section 1.4(b)(2)).

FEDERAL COMMUNICATIONS COMMISSION

George S. Li
Chief, International Facilities Division
Common Carrier Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

THE MICRONESIAN TELECOMMUNICATIONS CORP. File No. I-T-C-91-210

Application for authority to acquire and operate facilities for direct service between the Northern Mariana Islands and Hong Kong.

ORDER, AUTHORIZATION AND CERTIFICATE

Adopted: November 15, 1991; Released: November 22, 1991

By the Chief, International Facilities Division:

1. Upon consideration of the above-captioned uncontested application, filed pursuant to Section 214 of the Communications Act of 1934, as amended, IT IS HEREBY CERTIFIED that the present and future public convenience and necessity require the provision of direct international message telephone service (IMTS) between the Commonwealth of Northern Mariana Islands (CNMI) and Hong Kong by the Micronesian Telecommunications Corp. (MTC).

2. Accordingly, IT IS ORDERED that application File No. I-T-C-91-210 IS GRANTED, and MTC is authorized to:

a. lease from Comsat and operate five voice-grade satellite circuits between the Susupe, Saipan earth station and an appropriate INTELSAT satellite over the Pacific Ocean, connecting with similar circuits between the satellite and an earth station in Hong Kong furnished by MTC's correspondent, Hong Kong Telecom International Ltd.;

b. use said facilities to provide MTC's regularly authorized services between the Commonwealth of Northern Mariana Islands and Hong Kong and beyond.

3. The Commission retains jurisdiction over this matter to reallocate circuits in the satellite system among the various international common carriers and other authorized users as required to ensure nondiscriminatory use of, and equitable access to, the communications satellite system.

4. No material changes inconsistent with this or any other relevant Commission order shall be made before final execution of an operating agreement between the applicant, and its correspondent, and a copy of the agreement shall be filed with the Commission within 30 days of its execution.

5. IT IS FURTHER ORDERED that the applicant shall file a tariff pursuant to Section 203 of the Communications Act, 47 U.S.C. Section 203, and Part 61 of the Commission's Rules, 47 C.F.R. Part 61, for the service authorized in this Order.

6. IT IS FURTHER ORDERED that the applicant shall file the annual reports of overseas telecommunications traffic required by Section 43.61 of the Commission's Rules, 47 C.F.R. §43.61.

7. IT IS FURTHER ORDERED that the applicant shall file semi-annual circuit reports pursuant to Section 63.10(b) of the Commission's Rules, 47 C.F.R. Section 63.10(b).

8. This order is issued under Section 0.291 of the Commission's Rules and is effective upon adoption. Petitions for reconsideration under Section 1.106 or applications for review under Section 1.115 of the Commission's Rules may be filed within 30 days of the date of public notice of this order (*see* Section 1.4(b)(2)).

FEDERAL COMMUNICATIONS COMMISSION

George S. Li
Chief, International Facilities Division
Common Carrier Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

MCI TELECOMMUNICATIONS CORP. File No. I-T-C-91-211

Application for authority to acquire and operate facilities for service between the U.S. and Lebanon.

ORDER, AUTHORIZATION AND CERTIFICATE

Adopted: November 15, 1991; Released: November 22, 1991

By the Chief, International Facilities Division:

1. Upon consideration of the above-captioned uncontested application, filed pursuant to Section 214 of the Communications Act of 1934, as amended, IT IS HEREBY CERTIFIED that the present and future public convenience and necessity require the provision of direct service to Lebanon by MCI Telecommunications Corporation (MCI).

2. Accordingly, IT IS ORDERED that application File No. I-T-C-91-211 IS GRANTED, and MCI is authorized to:

a. reassign and operate six voice-grade circuits in the TAT-7 cable currently jointly owned by MCII and its correspondent in France for service with Lebanon;

b. lease and operate six voice-grade circuits between Tuckerton, N.J. TAT-7 cable station and MCI's Crystal Lake, N.J. office;

c. lease from British Telecommunications plc (BT) a one-half interest in and operate six voice-grade circuits in the UK-France 2 cable between the cable stations at Eastbourne, England and St. Valery, France;

d. lease from BT and operate six half-circuits between the cableheads at Lands End, England and Eastbourne, England;

e. lease from France Telecom (FT) and operate six half-circuits between the cable station at St. Valery, France and the earth station at Pleumeur, France;

f. lease from FT and operate six voice-grade satellites circuits between the Pleumeur, France earth station and an INTELSAT satellite over the Indian Ocean; and[1]

g. use said facilities to provide MCI's regularly authorized services between the U.S. and Lebanon and beyond.

3. No material changes inconsistent with this or any other relevant Commission order shall be made before final execution of an operating agreement between the applicant, and its correspondent and a copy of the agreement shall be filed with the Commission within 30 days of its execution.

4. IT IS FURTHER ORDERED that the applicant shall file a tariff pursuant to Section 203 of the Communications Act, 47 U.S.C. Section 203, and Part 61 of the Commission's Rules, 47 C.F.R. Part 61, for the service authorized in this Order.

5. IT IS FURTHER ORDERED that the applicant shall file the annual reports of overseas telecommunications traffic required by Section 43.61 of the Commission's Rules, 47 C.F.R. §43.61.

6. IT IS FURTHER ORDERED that the applicant shall file semi-annual circuit reports pursuant to Section 63.10(b) of the Commission's Rules, 47 C.F.R. Section 63.10(b).

7. This order is issued under Section 0.291 of the Commission's Rules and is effective upon adoption. Petitions for reconsideration under Section 1.106 or applications for review under Section 1.115 of the Commission's Rules may be filed within 30 days of the date of public notice of this order (*see* Section 1.4(b)(2)).

FEDERAL COMMUNICATIONS COMMISSION

George S. Li
Chief, International Facilities Division
Common Carrier Bureau

FOOTNOTE

[1] MCI states that its correspondent in Lebanon has agreed to provide the following at its sole expense: (a) the matching half-circuits in TAT-7 and UK-France 2 cables; (b) the matching half-circuits of the international satellite facilities; and (c) the matching half-circuits of all necessary connecting facilities.

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

US SPRINT COMMUNICATIONS COMPANY LIMITED PARTNERSHIP — File No. I-T-C-91-212

Application for authority to acquire and operate facilities for direct service between the U.S. and Yugoslovia

ORDER, AUTHORIZATION AND CERTIFICATE

Adopted: November 15, 1991; Released: November 22, 1991

By the Chief, International Facilities Division:

1. Upon consideration of the above-captioned uncontested application, filed pursuant to Section 214 of the Communications Act of 1934, as amended, IT IS HEREBY CERTIFIED that the present and future public convenience and necessity require the provision of direct service between the U.S. and Yugoslovia by US Sprint Communications Company Limited Partnership (US Sprint).

2. Accordingly, IT IS ORDERED that application File No. I-T-C-91-212 IS GRANTED, and US Sprint is authorized to:

a. lease from Comsat and operate 36 voice-grade satellite circuits between the Etam, West Virginia earth station and an appropriate INTELSAT satellite over the Atlantic Ocean, connecting with similar circuits between the satellite and an earth station in Yugoslovia furnished by US Sprint's correspondent in Yugoslovia, the Public Enterprise of Posts and Telecommunications;

b. lease from AT&T and operate 36 voice-grade circuits in the Etam, West Virginia earth station;

c. lease from AT&T and operate 36 voice-grade circuits between the Etam, West Virginia earth station and US Sprint's operating center in New York; and

d. use said facilities to provide US Sprint's regularly authorized services between the U.S. and Yugoslovia and beyond.

3. The Commission retains jurisdiction over this matter to reallocate circuits in the satellite system among the various international common carriers and other authorized users as required to ensure nondiscriminatory use of, and equitable access to, the communications satellite system.

4. No material changes inconsistent with this or any other relevant Commission order shall be made before final execution of an operating agreement between the applicant and its correspondent, and a copy of the agreement shall be filed with the Commission within 30 days of its execution.

5. IT IS FURTHER ORDERED that the applicant shall file a tariff pursuant to Section 203 of the Communications Act, 47 U.S.C. Section 203, and Part 61 of the Commission's Rules, 47 C.F.R. Part 61, for the service authorized in this Order.

6. IT IS FURTHER ORDERED that the applicant shall file the annual reports of overseas telecommunications traffic required by Section 43.61 of the Commission's Rules, 47 C.F.R. §43.61.

7. IT IS FURTHER ORDERED that the applicant shall file semi-annual circuit reports pursuant to Section 63.10(b) of the Commission's Rules, 47 C.F.R. Section 63.10(b).

8. This order is issued under Section 0.291 of the Commission's Rules and is effective upon adoption. Petitions for reconsideration under Section 1.106 or applications for review under Section 1.115 of the Commission's Rules may be filed within 30 days of the date of public notice of this order (*see* Section 1.4(b)(2)).

FEDERAL COMMUNICATIONS COMMISSION

George S. Li
Chief, International Facilities Division
Common Carrier Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

GTE SPACENET CORPORATION — File No. I-T-C-86-103

Application for authority pursuant to Section 214 of the Communications Act of 1934, as amended, and Section 63.01 of the Commission's Rules, to extend its existing satellite services to points in the U.S. and the Caribbean.

GE AMERICAN COMMUNICATIONS, INC. — File No. I-T-C-85-147

For authority pursuant to Section 214 of the Communications Act, as amended, to provide satellite services between the United States and certain specified Caribbean and Latin American locations.

HUGHES COMMUNICATIONS GALAXY, INC. — File No. I-T-C-83-136

For authority pursuant to Section 214 of the Communications Act, as amended, to utilize Westar satellite capacity for communication between various points in the United States and points in Mexico, Costa Rica, Haiti, Dominican Republic, and Belize.

HUGHES COMMUNICATIONS GALAXY, INC. — File No. I-T-C-83-139

For authority pursuant to Section 214 of the Communications Act, as amended, to utilize Westar satellite capacity for communication between various points in the United States and points in the Bahamas, Bermuda, British Virgin Islands, Cayman Islands, Jamaica and St. Kitts-Nevis.

HUGHES COMMUNICATIONS GALAXY, INC. — File No. I-T-C-86-104

For authority pursuant to Section 214 of the Communications Act, as amended, to use Westar satellite capacity for communication between the United States and the Bahamas.

OVERSEAS TELECOMMUNICATIONS, INC. — File No. I-T-C-87-136

For authority pursuant to Section 214 of the Communications Act, as amended, to establish and operate channels of communication between the United States and points in the Caribbean and Central and South America.

RAINBOW NETWORK COMMUNICATIONS — File No. I-T-C-85-092

Application for authority pursuant to Section 214 of the Communications Act, as amended, to offer common carrier satellite lines of communication between earth stations in the United States and in the Caribbean via the RCA Satcom, Hughes, GTE, Western Union Westar and SBS Systems.

RAINBOW NETWORK COMMUNICATIONS — File No. 889-DSE-ML-85

Application for modification of its license for a fixed transmit/receive satellite earth station (WL94) at Belmont, New York to permit communications with the Satcom, Hughes, GTE, Westar and SBS systems for service between the United States and Caribbean locations.

SOUTH STAR COMMUNICATIONS, INC. — File No. I-T-C-86-089

Application for authority pursuant to Section 214 of the Communications Act, as amended, to extend existing services to transborder locations.

SOUTH STAR COMMUNICATIONS, INC. File No. 1140-DSE-ML-86

Application for modification of its domestic license for a fixed satellite earth station (E8846) at Davie, Florida, to permit communications with the Canadian ANIK satellite series.

John Michael Garner, d/b/a TELE-LINK, INC. File No. I-T-C-86-129

For authority pursuant to Section 214 of the Communications Act, as amended, to extend domestic satellite communications service to transborder locations.

E. Vernon Oliver & John Michael Garner d/b/a TELE-LINK, INC. File No. I-T-C-86-130

For authority pursuant to Section 214 of the Communications Act, as amended to extend domestic satellite communications service to transborder locations.

MEMORANDUM OPINION, ORDER AND AUTHORIZATION

Adopted: November 15, 1991; Released: November 22, 1991

By the Chief, Common Carrier Bureau:

1. The Common Carrier Bureau (Bureau) has before it for consideration the above-captioned applications which request authority pursuant to Section 214 of the Communications Act of 1934, as amended, to provide two-way transborder services between the U.S. and Latin American/Caribbean locations, one-way service to the U.S. from Latin American/Caribbean locations and one-way service to Latin American/Caribbean locations from the U.S. As set forth below, the subject applications were conditionally authorized by the Bureau in the *Transborder XIII* decision and were subsequently remanded by the Commission to the Bureau for reconsideration in light of additional information to be furnished by the applicants.[1] For the reasons discussed below, we grant the applications of GTE Spacenet Corp., Hughes Communications Galaxy, Inc. and Overseas Telecommunications, Inc; we grant in part and deny in part the applications of GE American Communications, Inc. and Rainbow Network Communications; the applications of South Star Communication, Inc. and Tele-Link, Inc. are dismissed.[2]

I. BACKGROUND

2. In a decision released April 20, 1987, the Bureau conditionally authorized the above-captioned applicants to provide two-way transborder services between the U.S. and Latin American/Caribbean locations and one-way service from these transborder locations to the U.S.[3] The *Transborder XIII* decision focused primarily on the provision of two-way services where the extension of an existing or planned domestic network was proposed. In such circumstances, the Bureau noted that use of INTELSAT facilities would be both uneconomical and impractical.[4] Communications Satellite Corporation (Comsat) filed a petition for reconsideration based on its contention that two-way services could not be provided between the U.S. and points other than Canada and Mexico. Two-way transborder services have been authorized only between the U.S. and Canada and Mexico since INTELSAT has not traditionally provided service between the U.S. and those points. Prior to the *Transborder XIII* decision, the Commission, in its *Jamaica Teleport* decision, conditionally authorized transborder service between the U.S. and Jamaica, the first time two-way transborder service between the U.S. and a point other than Canada and Mexico was authorized.[5]

3. During the pendency of Comsat's petition for reconsideration of the *Transborder XIII* decision, the U.S. Court of Appeals for the District of Columbia Circuit remanded for further consideration the Commission's *Jamaica Teleport*.[6] The Court's decision, which did not deal directly with the Commission's *Transborder XIII* decision, contained a detailed analysis of the Commission's Transborder policy and the Court's interpretation as to how the policy had been applied in past Commission decisions. The Court stressed that the burden is on the applicant to demonstrate that use of INTELSAT facilities would be uneconomical or impractical. The Court noted that an applicant could meet this standard by showing that "the INTELSAT system could not provide the service in question in its entirety and without duplication of facilities and that the domestic satellite system could more nearly do so."[7]

4. On March 2, 1989 the Commission granted in part Comsat's petition for reconsideration of the *Transborder XIII* decision and remanded to the Bureau for further consideration certain applications which had been conditionally authorized for two-way business and occasional video services between the United States and Latin American/Caribbean locations.[8] In the *Transborder XIII Reconsideration* decision, the Commission found that, with one exception, the applications did not meet the standards set forth in the Buckley letter, as interpreted by the Court in *Jamaica Teleport Remand*, as a prerequisite for a finding that use of INTELSAT would be uneconomical or impractical.[9] In particular, the Commission noted that the applications proposed to provide a wide variety of two-way services without focusing on the specific services envisioned and on satisfying the Buckley letter criteria. Although some of the two-way services undoubtedly involved the extension of existing domestic networks, the Commission stated that the applications failed to identify the types of services to be provided except in the most general terms. In this regard, the Commission found that additional information was required before further action could be taken on the subject applications.

5. The Commission remanded to the Bureau the task of obtaining additional information which would help determine the precise nature of the services contemplated by the applicants. The Bureau asked the applicants to identify with specificity each service to be provided. The Bureau also asked the applicants to specify whether the services were one-way or two-way, and to describe how the Buckley criteria could be satisfied in each instance. With respect to two-way services, the Bureau asked whether such services involved the extension of an existing domestic network. Substantive responses to the Bureau's questions were received from GTE Spacenet Corporation (GTE), GE American Communications, Inc. (GE Americom), Hughes Communications Galaxy, Inc. (Hughes), Overseas Telecommunications, Inc. (OTI) and Rainbow Network Communications (Rainbow).[10] Comments were filed by the Communications Satellite Corporation (Comsat).

II. THE APPLICATIONS AS SUPPLEMENTED

6. *GTE (File No. I-T-C-86-103).* GTE seeks authority to provide two-way business and occasional video services between the United States and various points in the Caribbean and Latin America. GTE states that the two-way business services will include data and electronic document distribution, voice communications and video teleconferencing. GTE maintains that the authorization of the two-way business services would allow its customers operating on the existing domestic network to add points of communication in transborder locations. GTE notes that the transborder links would remain incidental to an existing domestic service. GTE also proposes to provide one-way video services from transborder points to the U.S. and two-way video services as well. Specifically, GTE notes that a number of its customers require a video service for rapidly breaking news stories or other special events, and should not be required to use separate, international space segment facilities that impose unduly burdensome costs and involve the use of duplicative facilities.

7. GTE states that use of INTELSAT space segment to provide these links would involve both a duplication of facilities and an inefficient use of the scarce and valuable radio spectrum, imposing unnecessary costs on customers. Additionally, GTE asserts that duplicative links could actually impair the ability of INTELSAT to meet the growing demand for new international services. GTE states that, given the exhorbitant costs associated with using INTELSAT, domestic users will opt to forego transborder links, and, as a result, no company will provide such services. In contrast, GTE notes, its customers already have leased capacity on a domestic satellite, and can utilize small, transportable earth stations which are easily and quickly deployed in remote locations where land lines leading to the nearest INTELSAT earth station may not be easily procured, or even available, given the time constraints. GTE views the authorization of the requested two-way services as a logical development of the Commission's previous authorization for the provision of one-way video, audio, and data receive-only services from the U.S. to points in the Caribbean and Latin America.

8. *GE Americom (File No. I-T-C-85-147).* GE Americom seeks blanket authority to provide two-way voice and data services and occasional one-way and two-way video services between the United States and various points in the Caribbean and Latin America. The two-way voice and data services would include private line point-to-point, as well as point-to-multipoint communications. GE Americom states that the voice and data services would add to existing domestic networks which provide the same services and would be used by various governmental agencies and private firms. Occasional video services would consist of one-way transmission of news, entertainment and sporting events, as well as two-way videoconferencing.

9. GE Americom notes four areas in which INTELSAT cannot provide the private line or occasional video services offered by GE Americom. These areas include places where no international earth stations exist or where, despite the existence of earth stations, it is not possible to connect with INTELSAT at all times. They also consist of places where INTELSAT has limited space segment capacity for certain services, which can be saturated by coverage of major events in a region and which might not always be available for last minute uses, such as fast-breaking news events. Finally, GE Americom expresses concern with the non-availability of or limitations in foreign terrestrial services necessary to carry transmissions from remote areas to international earth stations.

10. According to GE Americom, the use of INTELSAT in providing the proposed services would be clearly uneconomical or impractical. GE Americom compares the cost of using occasional video services such as those offered by itself between the United States and Panama with that of using INTELSAT and notes that using INTELSAT would cost users approximately thirteen times more. GE Americom states that significant duplication of facilities would occur because domestic satellites currently have the capability of accessing the transborder points which GE Americom requests authority to serve. Finally, GE Americom argues that service cannot be provided in its entirety because INTELSAT can only provide service from points in the transborder location to a remote location in the United States.

11. *Hughes (File Nos. I-T-C-83-136, I-T-C-83-139, I-T-C-86-104).*[11] Although the original applications requested a wide range of services to transborder points via all the Westar satellites, Hughes now amends its request so that only Westar IV would be authorized to provide one-way audio radio services to the United States from points in the Bahamas, the British Virgin Islands, the Cayman Islands, and Jamaica. Hughes states that this point-to-multipoint transmission service would merely be an extension of its existing domestic satellite system. Hughes asserts that the use of INTELSAT facilities to provide this type of occasional audio radio service one-way from points in the Caribbean to the U.S. is impractical and uneconomical from both a transmit and receive perspective.

12. Hughes states that wide-band audio services are difficult to obtain or even unavailable from INTELSAT signatories at these foreign locations. Moreover, Hughes notes that the scarcity of terrestrial links between the remote broadcast locations from which these services will be transmitted and an INTELSAT earth station, and the difficulty in obtaining access to the terrestrial links that do exist, make it impractical, if not impossible, to use INTELSAT for transmissions. In contrast, Hughes asserts, use of Westar IV would allow the utilization of small, mobile earth stations for occasional C-band transmissions, and obviate the inefficiency and impracticality of using INTELSAT facilities and inaccessible terrestrial link-ups.

Because of the existing domestic network in the U.S., the duplicative use of INTELSAT ground receiving facilities would be costly, impractical, and inefficient.

13. Hughes submits that given the occasional use of the proposed service, requiring the use of INTELSAT facilities would compel the burdensome and impractical use of extensive terrestrial links to each of the thousands of stations that might wish to receive this service, or, in the alternative, the use of a double satellite hop - an inefficient use of the limited radio spectrum - to provide such services. Such use, Hughes argues, would be both impractical and uneconomical, and in some cases even impossible. According to Hughes, use of Westar IV to provide this occasional service allows an existing domestic network to be used efficiently, alleviates unnecessary facility connections, and requires no additional expenditures to receive these services.

14. *Overseas Telecommunications, Inc. (File No. I-T-C-87-136).* OTI seeks blanket authority to provide one-way video, audio and data services already consulted with INTELSAT and conditional blanket authority for two-way business services and two-way, full-time and occasional video and audio services between the U.S. and points in the Caribbean and Central and South America. According to OTI, the proposed two-way services would constitute extensions of already-existing domestic networks, which currently provide similar two-way services to a variety of customers in the U.S. and between the U.S. and Canada and Mexico.

15. OTI states that using INTELSAT capacity would be clearly uneconomical and impractical. By using space segment it already owns on domestic systems, OTI points out, it can avoid incurring the additional costs associated with the use of INTELSAT capacity. OTI notes that providing the services through INTELSAT would also be inefficient, since it would involve duplicative use of radio spectrum, extensive use of inefficient terrestrial links and double satellite hops. Finally, OTI asserts that, at least in the case of two-way video services for news gathering, its domestic satellite network, combined with transportable earth stations, is more convenient because terrestrial links may not be accessible or available where needed.

16. *Rainbow (File Nos. I-T-C-85-092, 889-DSE-ML-85).* Rainbow seeks to provide two-way video and audio transmissions between the United States and points in Latin America and the Caribbean. Under Rainbow's proposed service, all transmissions would be point-to-multipoint for programming purposes, would utilize an existing domestic network, and would be primarily one-way, except when an insert (or backhaul) from a distant location is used. For private third party clients, service would be either one-way or two-way depending on their particular needs. Third party transmissions would transmit point-to-multipoint utilizing an existing domestic network or an ad hoc temporary network, or transmit point-to-point, as in the case of news organizations. Rainbow notes that INTELSAT traditionally provides only point-to-point services, incurring the need for expensive terrestrial connection charges from receiving locations. Rainbow asserts that the use of INTELSAT facilities to provide the type of services desired is more costly on an occasional and a contractual basis, and is impractical as well, considering the ability of the existing network to provide the services. Rainbow states that it can send a Ku-band uplink vehicle to locations more quickly and with less cost to the customer than INTELSAT. According to Rainbow, these factors are especially important to news gathering clients seeking live coverage of fast-breaking news stories. Rainbow believes that the use of INTELSAT would result in fewer transmissions due to excessive costs and implementation difficulties.[12]

III. COMMENTS

17. While Comsat believes that the applications for the most part comply with the Court's decision in the *Jamaica Teleport Remand* insofar as the Buckley letter criteria is concerned, it points to what it perceives as deficiencies and inaccuracies in the applications. Comsat's primary concern is that the information filed by GE Americom and Rainbow includes cost comparisons between INTELSAT space segment and domestic satellite space segment facilities. Comsat questions whether the use of such cost comparisons can satisfy the "clearly uneconomical and impractical" prong of the Buckley criteria, in light of the Court's decision in *Jamaica Teleport Remand*. Comsat is also concerned that the applicants have stated or at least implied that transportable earth stations cannot be used to provide service via INTELSAT. Comsat points out that transportable earth stations have been used with the INTELSAT system both in the U.S. and abroad to provide a variety of services of high quality. Finally, Comsat states that it has little problem agreeing to services that are point-to-multipoint (i.e., business services) where most of the points are domestic, since the extension of domestic service is involved. However, in the case of services which are point-to-point (i.e., an inbound occasional use video channel), Comsat notes that the applicants have not shown that INTELSAT cannot provide these services in their entirety and without duplication of facilities. This is particularly the case where INTELSAT has been providing these services for years throughout Latin America and the Caribbean.

IV. DISCUSSION

18. The starting point of our analysis with respect to these services is the Buckley letter, which set forth the criteria to be considered in acting on applications for transborder service, and the decision by the United States Court of Appeals in *Jamaica Teleport Remand* which interpreted the Commission's Transborder policy.

19. Under the criteria set forth in the Buckley letter, domestic satellites may be used for certain international public telecommunications services where: 1) INTELSAT cannot provide the service; or 2) it would be clearly uneconomical or impractical to use the global system for the service. The Court in *Jamaica Teleport Remand* concluded that the "uneconomical or impractical" aspect of the Buckley letter criteria could be satisfied by showing that the INTELSAT system could not provide the service in question in its entirety and without duplication of facilities, and that the domestic satellite system could more nearly do so. 836 F.2d at 635.

20. For the most part, the Commission's Transborder decisions have focused on the second prong of the Buckley criteria. For example, the Commission has found that use of the INTELSAT system would be clearly uneconomical and impractical where the mere reception and redistribution of existing U.S. video programming is involved. *See Transborder Satellite Video Services*, 88 FCC 2d 258, 280 (1981) (Duplication of services over

INTELSAT would involve terrestrial links or multi-hop satellite connections, increase costs and result in an inefficient use of the available radio spectrum).[13] The Commission applied a similar analysis in finding that use of the INTELSAT system for transborder business services would also be clearly uneconomical or impractical. *See Satellite Business Systems*, 88 FCC 2d 195 (1981) (Commission authorized the provision of two-way business communications between the U.S. and Canada where the extension of an existing U.S. domestic network was involved).

21. In the *Transborder XIII Reconsideration* decision, the Commission, mindful of the Court's decision in the *Jamaica Teleport Remand*, stated that where services which the applicant proposed were not mere extentions of existing domestic networks, the burden "is clearly on the applicant to provide the Commission information sufficient to make the required findings under the Buckley letter standards." 4 FCC Rcd at 2073. To satisfy the Buckley criteria, therefore, applicants must identify, in the first place, whether the proposed two-way service involves the extension of, or access to, an existing domestic network. If such an extension is involved, the Commission said, applicants need only show that using INTELSAT for the proposed services would require multiple satellite hops, use of additional terrestrial facilities and inefficient use of the spectrum. Applicants also must specify the services to be provided, and how the services satisfy the Buckley criteria relevant to the service. Additionally, the Commission noted that applicants may supply cost data to support their cost contentions, although such cost data, alone, would not necessarily excuse the applicants from showing that INTELSAT could not provide the services in their entirety and without duplication of facilities, and that the domestic satellite systems involved could more nearly do so.

22. The additional information submitted by the applicants here demonstrates that, with the exception of point-to-point service, the provision of two-way services as described herein would be "clearly uneconomical and impractical" if provided over the INTELSAT system. In addition, we conclude that the provision of one-way audio and video services from Latin American/Caribbean locations to the U.S. also meets the "clearly uneconomical or impractical" prong of the Buckley criteria under the circumstances described herein.

23. For the most part, the two-way services proposed in the applications, as supplemented, are business services that involve the extension of a domestic network. Indeed, the provision of two-way business services under these circumstances is no different than the services proposed in the *Satellite Business Systems* decision, *supra*. Use of INTELSAT facilities would require duplication of costs and facilities, when maximum operational efficiency could be achieved through the use of one satellite that is already in place and capable of providing the service in the geographic areas requested.

24. The applicants also propose to transmit one-way video and audio programming from Latin American/Caribbean locations to U.S. domestic satellites. According to the applicants, such authority is required primarily for fast-breaking news events. In such instances, a small transportable earth station could be taken to remote locations where there are no terrestrial facilities available to reach an INTELSAT earth station. Comsat objects to the characterization of these services to the extent that it ignores the fact that transportable earth stations are used with the INTELSAT system.

25. The use of such small transportable earth stations in transborder locations to relay news coverage to the United States would appear to meet the "clearly uneconomical or impractical" requirement of the Buckley letter under certain circumstances. Where news organizations have existing domestic networks, the use of a transportable earth station to access that domestic network is more operationally efficient than the use of the INTELSAT system. Direct access to the domestic network on a U.S. domestic satellite would allow for coverage to be delivered to all affiliates on the network using the same domestic satellite. Use of the INTELSAT system in such instances would be clearly uneconomical and impractical since additional space segment would be required, resulting in multiple satellite hops. Once the signal is received at a U.S. international earth station licensed to communicate with the INTELSAT system, terrestrial facilities are required to relay the signal to an uplink domestic earth station accessing the existing domestic network unless the uplink domestic earth station is collocated with the international earth station.[14]

26. In light of these circumstances, we do not share Comsat's concern with respect to the comparative cost analysis by GE Americom and Rainbow since it is clear that the applicants also rely on a qualitative component in asserting that use of INTELSAT for their proposed services would be clearly uneconomical and impractical. We also disagree with Comsat's concern that the justification used in the applications for one-way service from transborder locations to the U.S. implies that transportable earth stations cannot be used to provide service via INTELSAT. The fact that transportable earth stations may be used in connection with the INTELSAT system does not alter our analysis with respect to the global system being uneconomical and impractical for transborder services in these cases, since multiple satellite hops, and possibly terrestrial links, would be required.

27. Where two-way service is proposed which does not have a domestic component (i.e., point-to-point service), we do not believe that the applications have satisfied the Buckley letter criteria. As the Court in *Jamaica Teleport Remand* noted, a cost comparison where qualitative factors are not present may not satisfy the Buckley criteria. The Court recognized that:

> . . . higher prices for international service are to some degree inherent in INTELSAT's system of globally averaged rates, mandated under Article V(d) of the INTELSAT Treaty. Both that treaty and the Communications Satellite Act envisioned a regime under which INTELSAT would be protected from full-scale competition in the interest of other, overriding goals. 836 F.2d at 633.

To date, two-way, point-to-point service has been authorized under the Transborder policy between the U.S. and Canada and Mexico. However, the chief consideration in those instances was that INTELSAT had not been used for service between the U.S. and Canada and Mexico due to the higher costs involved in using the INTELSAT facilities compared with the lower cost terrestrial networks.[15] Thus, use of domestic satellites for transborder services did not compete with INTELSAT, but with well-developed terres-

trial systems. The same situation does not apply to non-contiguous transborder locations, such as those under consideration here, where INTELSAT has a history of providing service and terrestrial facilities are not available. As the Court noted in *Jamaica Teleport Remand*, an applicant seeking to satisfy the Buckley letter criteria based solely on a cost comparison faces a heavy burden. In this instance, we find that GE Americom's and Rainbow's recitation of comparative costs for capacity on domestic satellites and INTELSAT is not, by itself, sufficient to satisfy the "clearly uneconomical or impractical" standard set forth in the Buckley letter.

V. CONCLUSION AND ORDERING CLAUSES

28. In light of the above considerations, we find that the conditional grant of applications proposing two-way business services and one-way audio and video service from Latin American/Caribbean locations to the U.S. are consistent with the Buckley letter criteria in those cases where the extension of, or access to, an existing domestic network is involved.

29. Accordingly, IT IS ORDERED that the applications of GTE Spacenet Corporation (File No. I-T-C-86-013), Hughes Communications Galaxy, Inc. (File Nos. I-T-C-83-136, I-T-C-83-139 and I-T-C-86-104) and Overseas Telecommunications, Inc. (File No. I-T-C-87-136) ARE CONDITIONALLY GRANTED insofar as they propose two-way services between the U.S. and Latin American/Caribbean locations or one-way audio and video services from Latin American/Caribbean locations to the U.S., where the services involve the extension of, or access to, an existing domestic network. No service may be implemented until:

(a) consultations pursuant to Article XIV(d) of the INTELSAT Agreement have been completed and the Commission has been notified by the State Department that U.S. obligations have been fulfilled; and

(b) the Chief, Common Carrier Bureau issues an order authorizing the implementation of service.

30. IT IS FURTHER ORDERED that the application of Overseas Telecommunications, Inc. (File No. I-T-C-87-136) for receive-only video, audio and data services to Latin American/Caribbean locations IS GRANTED on a final basis and may be implemented, consistent with consultations completed under Article XIV(d) of the INTELSAT Agreement, without further action by the Commission.

31. IT IS FURTHER ORDERED that the applications of GE American Communications, Inc. (File No. I-T-C-85-147) and Rainbow Network Communications (File Nos. I-T-C-85-092 and 889-DSE-ML-85) ARE CONDITIONALLY GRANTED in part, to the extent that they propose two-way services between the U.S. and Latin American/Caribbean locations or one-way audio and video services from Latin American/Caribbean locations to the U.S., where the services involve the extension of, or access to, an existing domestic network, and DENIED in part, to the extent that the proposals do not involve the extension of, or access to, an existing domestic network. No service may be implemented until the procedure stated in paragraph 29 occurs.

32. IT IS FURTHER ORDERED that the applications of South Star Communications, Inc. (File Nos. I-T-C-86-089 and 1140-DSE-ML-86) ARE DISMISSED.

33. IT IS FURTHER ORDERED that the portions of Tele-Link's applications (File Nos. I-T-C-86-129 and I-T-C-86-130) requesting authority for two-way services between the U.S. and transborder locations other than Canada and Mexico, as well as one-way service from Latin American/Caribbean locations to the U.S., ARE DISMISSED.

34. This order is issued under Section 0.291 of the Commission's rules and is effective upon release. Petitions for reconsideration under Section 1.106 or applications for review under Section 1.115 of the Commission's rules may be filed within 30 days of the public notice of this order (*See* Section 1.4(b)(2)).

FEDERAL COMMUNICATIONS COMMISSION

Richard M. Firestone
Chief, Common Carrier Bureau

FOOTNOTES

[1] GTE Spacenet, et al., 2 FCC Rcd 2477 (1987) (*Transborder XIII), recon.*, 4 FCC Rcd 2071 (1989) (*Transborder XIII Reconsideration)*. The application of Overseas Telecommunications, Inc. was not authorized in the *Transborder XIII* decision. Nevertheless, the Bureau considers the application here because it presents the same issues with respect to two-way transborder services between the U.S. and points other than Canada and Mexico.

[2] *See infra* note 10.

[3] *Transborder XIII*, 2 FCC Rcd 2477 (1987).

[4] The underpinnings of the Commission's Transborder policy is based on criteria set forth in a letter dated July 23, 1981 from then Under Secretary of State James L. Buckley to then FCC Chairman Mark Fowler (Buckley letter). *See infra* para. 18.

[5] Teleport International Ltd., 1 FCC Rcd 101 (1986).

[6] Communications Satellite Corp. v. F.C.C., 836 F.2d 623 (1988) (*Jamaica Teleport Remand)*.

[7] *Id.* at 635.

[8] *Transborder XIII Reconsideration*, 4 FCC Rcd 2071 (1989). That portion of the *Transborder XIII* decision which granted final authority for two-way services between the U.S. and Canada and Mexico and one-way services from the U.S. to Latin American/Caribbean locations was not remanded.

[9] The application of GE American Communications, Inc. (formerly RCA American Communications, Inc.), File No. I-T-C-87-040, which proposed one-way service from Latin American/Caribbean locations to the U.S., was found to meet the Buckley letter criteria. *Id.*

[10] A response on behalf of one of the original applicants, South Star Communications, Inc. (File Nos. I-T-C-86-089 and 1140-DSE-ML-86), states that it declared bankruptcy under Chapter 7 as of May 15, 1987 and has ceased operations. The response further states that South Star never built an earth station and is relinquishing all authorities, construction permits and revokes its pending applications. Another applicant, Tele-Link, Inc. (File Nos. I-T-C-86-129 and I-T-C-86-130), states that it no longer proposes to provide two-way services to locations

other than Canada and Mexico, or one-way service originating from points outside of the United States utilizing a domestic satellite system. Thus, Tele-Link requests that its pending application be amended to delete its request for authorization for such services. Tele-Link was authorized to provide two-way service between the U.S. and Canada and Mexico in the *Transborder XIII* decision and one-way service from the U.S. to various transborder locations in a prior decision. *RCA American Communications, Inc.*, 2 FCC Rcd 1869 (1987). Tele-Link's authorization for these services was not remanded in the *Transborder XIII Reconsideration* decision.

[11] The original applications conditionally authorized in *Transborder XIII* were filed by Western Union Telegraph Company. The Westar System, including Westars III, IV, V, and VI-S, has since been transferred to Hughes. *See Western Union Corp.*, 3 FCC Rcd 6792 (1988).

[12] Rainbow states that the cost difference between the two systems (INTELSAT and Rainbow) for one hour of service from Ecuador to the U.S. is approximately $1000. Rainbow notes that the cost difference adds up quickly and could inhibit transmissions.

[13] These findings also apply to the one-way services for which OTI requests authority. *See Transborder XIII*, 2 FCC Rcd at 2479-80.

[14] The Commission made a similar finding in conditionally authorizing GE Americom's application on behalf of NBC (File No. I-T-C-87-040) to use transportable earth stations to uplink news events from remote areas in transborder locations. *See* 4 FCC Rcd at 2074.

[15] *See, e.g.*, Satellite Business Systems, 88 FCC 2d at 205.

Before the
Federal Communications Commission
Washington, D.C. 20554

PUBLIC NOTICE

Released: November 15, 1991

PLEADING CYCLE ESTABLISHED FOR COMMENTS ON BELL OPERATING COMPANY PETITIONS FOR WAIVER OF ONA TARIFFING ORDERS

CC Docket No. 89-79
CC Docket No. 88-2

On November 8, 1991 and November 12, 1991, the Bell Operating Companies (BOCs) filed petitions for waiver of the Commission's ONA tariffing orders in CC Docket Nos. 88-2 and 89-79, which required the BOCs to file federal tariffs for all of the basic service elements listed in their approved ONA plans. These waiver petitions request that individual BOCs be permitted not to federally tariff those individual basic service elements that they believe are technically infeasible or otherwise impractical to tariff.

Interested parties should file comments on the petitions by **December 6, 1991,** and reply comments by **December 20, 1991,** with the Secretary, FCC, 1919 M Street, N.W., Washington, D.C. 20554. A copy should also be sent to Mark S. Nadel, Common Carrier Bureau, FCC, Room 544, 1919 M St., N.W., Washington, D.C. 20554, and to the Commission's contractor for public service records duplication: Downtown Copy Center, 1114 21st Street, N.W., Washington, D.C. 20036. Copies of the petitions can be obtained from the Downtown Copy Center at (202) 452-1422.

We will treat this proceeding as non-restricted for purposes of the Commission's *ex parte* rules. *See generally,* 47 C.F.R. §§ 1.1200-1.1216. For further information contact Mark Nadel, Policy and Program Planning Division of the Common Carrier Bureau, at (202) 632-6363.

FEDERAL COMMUNICATIONS COMMISSION

Before the
Federal Communications Commission
Washington, D.C. 20554

PUBLIC NOTICE

Released: November 15, 1991

PLEADING CYCLE ESTABLISHED FOR COMMENTS ON AT&T'S PETITION FOR LIMITED WAIVER OF COMPUTER III CEI REQUIREMENTS

On October 31, 1991, American Telephone and Telegraph Company (AT&T) filed a petition for a limited waiver of the Commission's *Computer III* comparably efficient interconnection (CEI) requirements so that it may offer enhanced services through its new Stand-Alone Public Enhanced Communications System (SPECS) public telephone. According to AT&T, SPECS is a new public telephone that will make available to callers basic voice and data communications services and an array of enhanced and other non-basic services, including weather information, stock quotations, and voice messaging. AT&T states that it is requesting a waiver only for those basic terminal capabilities integrated in the SPECS public telephone and that all underlying network services and other basic functions will be available to competing enhanced service providers (ESPs) in conformance with the CEI requirements.

AT&T states that CEI should not be required for SPECS integrated capabilities because CEI is not necessary to ensure non-discriminatory access to the basic network services underlying its SPECS offering. AT&T adds that a waiver of the CEI requirements is warranted because competing ESPs can utilize their own customer premises equipment to provide similar enhanced services, and can use AT&T network services in the same way as SPECS. Finally, AT&T states that the costs of providing CEI to SPECS would be prohibitive and would force AT&T to forego offering integrated enhanced services through SPECS.

Interested parties should file comments on the petition by **December 17, 1991,** and reply comments by **January 2, 1992,** with the Federal Communications Commission, 1919 M Street, N.W., Washington, D.C. 20554. A copy should also be sent to Daniel Gonzalez, Common Carrier Bureau, Federal Communications Commission, Room 544, 1919 M Street, N.W., Washington, D.C. 20554, and to the Commission's contractor for public service records duplication: Downtown Copy Center, 1114 21st Street, N.W., Washington, D.C. 20036. Copies of the petitions can be obtained from Downtown Copy Center at (202) 452-1422.

We will treat this proceeding as non-restricted for purposes of the Commission's *ex parte* rules. *See generally* 47 C.F.R. §§ 1.1200-1.1216. For further information contact Daniel Gonzalez, Policy and Program Planning Division of the Common Carrier Bureau, at (202) 632-9342.

FEDERAL COMMUNICATIONS COMMISSION

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 91-314

In re

Amendment of Part 73 of
the Commission's Rules
Regarding Broadcast Hoaxes

NOTICE OF PROPOSED RULE MAKING

Adopted: October 24, 1991; Released: November 14, 1991

Comment Date: January 2, 1992
Reply Comment Date: Feburary 3, 1992

By the Commission: Commissioner Quello issuing a statement.

1. In several recent incidents, stations have broadcast seemingly accurate programming that later proved to be a hoax.[1] In those instances, the hoax resulted in the use of what may have been substantial public safety resources to respond to fabricated events. As we have made clear on a number of occasions, we believe that certain types of broadcast hoaxes are so potentially harmful that they are inconsistent with the public interest. Accordingly, we believe that a continuing Commission regulatory role in this area may be appropriate.[2] The recent events, however, have highlighted the limitations on our enforcement flexibility which the absence of a specific Commission rule addressing hoaxes imposes.[3] Such a rule could be used to codify licensee obligations and would permit the Commission to levy fines in order to address harmful hoaxes, thereby allowing a sanction less drastic than license revocation, but with more deterrence value than admonition. We therefore initiate this proceeding to seek comment on how we could craft a rule to address our core concerns in this area without causing an undue chilling effect on broadcasters' speech.

2. In striking this balance, we are mindful that adopting an overbroad rule could have significant adverse effects. It is not our intent to address harmless pranks, or to deter broadcasts that might upset some listeners but do not pose a substantial threat to public health and safety. We have specifically rejected a regulatory approach that could be characterized as an "overreaction." *See Fourth Underbrush Order*. For example, we do not intend to reach incidents such as the April Fool's joke perpetrated recently by a station, which announced that one of the stars of the city's National Football League team had been traded. While this prank undoubtedly distressed some football fans, it is our intent to focus instead on a narrow category of cases that present the potential for substantial public harm. We believe that by focusing on three elements of a violation, it may be possible to craft such a rule.

3. First, we propose that, to be held liable, a licensee must have known that the broadcast material was false.[4] We observe that dramatizations generally will be implicated under this element since they are "false" by definition. We seek comment on whether the other elements of the rule (described below) adequately protect dramatizations from unwarranted scrutiny. Alternatively, we could limit the scope of the rule to false reports of crimes or catastrophes. If restricted in this fashion, the rule would cover the kinds of hoaxes that have raised the most public concern to date. We seek comment on this type of limitation.

4. Second, we propose that the hoax must have directly caused immediate, substantial and actual public harm. We seek comment on what should be considered "public harm." For example, should we consider damage to the health and safety of the general public, diversion of law enforcement or other public safety authorities from their duties, and damage to property to be encompassed within our definition of public harm? Is this list of harms in and of itself an appropriate definition? By "immediate," we mean that the harm would have to occur contempora-

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[1] For example, KROQ(FM), Pasadena, California, aired a false murder confession and WALE(AM), Providence, Rhode Island, aired a false report that one of its employees had been shot while on duty. Both situations caused significant distress to members of the listening audience and diverted police resources from legitimate crises.

[2] *See, e.g., Walton Broadcasting*, 78 FCC 2d 880 (1976), *aff'd* 78 FCC 2d 857 (1980), *aff'd without opinion* 679 F.2d 263 (D.C. Cir. 1982). In that case, license renewal was denied for a licensee that, *inter alia*, staged a fake kidnapping of its station's disc jockey, resulting in a flood of calls to the police. The licensee refused to call off the hoax when requested by the police, and, when a local television station exposed the hoax, the station broadcast a rebuttal. *See also Fourth Order Eliminating Unnecessary Broadcast Regulations*, 57 RR 2d 939 (1985) (*Fourth Underbrush Order*). In the *Fourth Underbrush Order*, we eliminated a Commission policy concerning scare announcements, finding that the policy constituted "regulatory overkill." In doing so, however, we concluded that our action did not alter the basic obligation of licensees to broadcast in the public interest.

[3] We note that the Commission's policy against news staging could apply to some hoax cases, but would not clearly cover many others and does not give the Commission authority to impose a monetary forfeiture. *See Hunger In America*, 20 FCC 2d 143 (1969); *Democratic National Convention*, 16 FCC 2d 650 (1969); *Letter to Mrs. J. R. Paul*, 26 FCC 2d 591 (1969); *The Selling of the Pentagon*, 30 FCC 2d 150 (1971); *WMJX, Inc.*, 85 FCC 2d 251 (1981). In addition, the Commission stated in the *Fourth Underbrush Order* that a current broadcast of a program like "War of the Worlds" without announcements that the program is fictional might violate the Commission's general policy requiring licensees to program their stations in the public interest and the Commission's more specific policy against deliberate distortion or falsification of programming. Again, however, no rule exists in this area and our enforcement response is therefore constrained. Moreover, the class of conduct which concerns us in this proceeding is, in most respects, narrower in scope and more susceptible to particularization in a rule than that which might be deemed to implicate the false programming policy.

[4] We note in this regard that licensees are ultimately responsible for the actions of their employees. *See Empire Broadcasting Corp.*, 25 FCC 2d 68 (1970).

neously with or shortly after the broadcast. We seek comment on whether this is an appropriate limitation on the scope of the harm. We also seek comment on whether the rule should be limited to instances involving "substantial" public harm. By including a substantiality test, we intend to exclude cases where the harm to the public may be real, but is of such a minor nature that it does not offset the potential chilling effect of a broader rule. We seek comment on ways we might measure the substantiality of harm. For example, one measure might be whether the harm is "widespread." Another might be the severity of the damage resulting from the harm, notwithstanding how widespread the harm.

5. With respect to the proposed requirement that the harm be actual, we note that some hoaxes may involve the potential for widespread panic, severe traffic congestion, and other dangers, but do not in fact result in such consequences. Is the threat of harm sufficient, or should the rule require actual damage? In this regard, to what extent should a licensee be excused from liability by virtue of the fact that a grossly irresponsible broadcast does not cause as great a degree of harm as it otherwise might? Would a rule premised on actual harm serve as a sufficient deterrent? On the other hand, would such an approach eliminate "harm" as an element of a violation and leave only "foreseeability of harm" as the dispositive factor when a broadcast is false? We also seek comment on whether any other provisions of federal,[5] state or local law provide adequate deterrence on a national basis.

6. Third, we propose to require that the public harm be foreseeable. To avoid imposing unreasonable or chilling constraints on broadcasters, we would consider public harm foreseeable only if the licensee could expect, with a significant degree of certainty, that such harm would occur as a result of the hoax. A foreseeability requirement would ensure that broadcasters will not be held responsible for unpredictable public behavior, and would avoid a waste of Commission resources on "obvious" hoaxes such as the amoeba hoax described in the Commission's *Fourth Underbrush Order*. [6] What factors should determine foreseeability? Should such factors include the content of the broadcast (*e.g.*, a report of a giant gorilla climbing the Empire State Building), and the date it occurred (*e.g.*, April Fool's Day)? Should the number of complaints received by the Commission or the station serve as evidence of the reasonableness of broadcasters' foreseeability judgments? Should the harm be regarded as foreseeable if a hoax elicits virtually no reaction from the general public, but a few people who believe in the hoax cause a great deal of harm? What relevance, if any, should the broadcast of appropriate warnings that the material in question is false have on issues of foreseeability?[7] Finally, in evaluating the foreseeability of harm, should we presume, and accord licensees the right to presume, that the public will behave in a rational manner? We seek comment on these issues.

7. The following model hoax rule, which incorporates the above elements, is intended as a framework for comment. Commenters should address whether the model rule is sufficiently inclusive, or whether there are additional harmful hoaxes that should be brought within the scope of such a rule. Commenters should also discuss whether the rule is overly restrictive and would encroach upon broadcasters' First Amendment rights and, more generally, whether adoption of a hoax rule is appropriate. Commenters' arguments and suggestions should also reflect our concern that any provisions adopted not be impermissibly vague or overbroad.

§ 73.1217 Broadcast hoaxes.

No licensee of any broadcast station shall broadcast information or other material it knows to be false if it is foreseeable that broadcast of the information could cause substantial public harm, and if broadcast of the information does in fact directly cause substantial public harm.

NOTE 1:

For purposes of this rule, "public harm" is immediate, substantial and actual damage to the health and safety of the general public or to property, or substantial diversion of law enforcement or other public safety authorities from their duties.

NOTE 2:

The public harm will be deemed foreseeable if the licensee could expect with a significant degree of certainty that public harm would occur. Foreseeability will not be inferred from warnings or disclaimers associated with the broadcast. Lack of foreseeability may be determined in light of factors such as the content of the broadcast or the timing of the broadcast (*e.g.*, April Fool's Day or Halloween).

ADMINISTRATIVE MATTERS

Ex Parte Rules -- Non-Restricted Proceeding

8. This is a non-restricted notice and comment rulemaking proceeding. *Ex parte* presentations are permitted, except during the Sunshine Agenda period, provided they are disclosed as provided in Commission rules. *See generally* 47 C.F.R. §§ 1.1202, 1.1203 and 1.1206(a).

Comment Information

9. Pursuant to applicable procedures set forth in §§ 1.415 and 1.419 of the Commission's Rules, interested parties may file comments on or before **January 2, 1992,** and reply comments on or before **February 3, 1992.** All

[5] *See , e.g., Emmis Broadcasting (KSHE)*, 6 FCC Rcd 2289 (1991) (assessing a $25,000 forfeiture for violation of the Communications Act's prohibition on the transmission of false distress signals).

[6] The Commission described the amoeba hoax as involving "a sudden announcement delivered in a tone of excitement to the effect that 'amoebas' were invading a certain city...." 57 RR 2d at 940.

[7] In this regard, we do not think that the broadcast of an associated warning or disclaimer should be considered to be evidence of foreseeability. To do so might discourage the use of disclaimers by licensees.

relevant and timely comments will be considered by the Commission before final action is taken in this proceeding. To file formally in this proceeding, participants must file an original and four copies of all comments, reply comments, and supporting comments. If participants want each Commissioner to receive a personal copy of their comments, an original plus nine copies must be filed. Comments and reply comments should be sent to the Office of the Secretary, Federal Communications Commission, Washington, D.C. 20554. Comments and reply comments will be available for public inspection during regular business hours in the Dockets Reference Room (Room 239) of the Federal Communications Commission, 1919 M Street, N.W., Washington, D.C. 20554.

Initial Regulatory Flexibility Analysis

10. We certify that the Regulatory Flexibility Act of 1980 does not apply to this rulemaking proceeding because if the proposed rule amendments are promulgated, there will not be a significant economic impact on a substantial number of small business entities, as defined by Section 601(3) of the Regulatory Flexibility Act. Broadcasters will not be liable for a monetary forfeiture unless the Commission determines that the hoax rule has been violated and that a monetary forfeiture is warranted. The Secretary shall send a copy of this Notice of Proposed Rule Making, including the certification, the Chief Counsel for Advocacy of the Small Business Administration in accordance with paragraph 603(a) of the Regulatory Flexibility Act. Pub. L. No. 96-354, 94 Stat. 1164, 5 U.S.C. Section 601 *et seq* (1981).

Additional Information

11. For additional information on this proceeding, contact Jane Hinckley, Mass Media Bureau, (202) 632-7792.

FEDERAL COMMUNICATIONS COMMISSION

Donna R. Searcy
Secretary

SEPARATE STATEMENT OF COMMISSIONER JAMES H. QUELLO

Notice of Proposed Rulemaking, Amendment of Part 73 of the Commission's Rules Regarding Broadcast Hoaxes

I welcome this proceeding given the number of high-profile broadcast hoaxes during the past year. Generally, I do not see how the public interest is served by a broadcast that does nothing more than scare or alarm the audience for the mere thrill of it. We should be able to draft a rule to deal with such situations.

At the same time, I recognize that direct regulation of broadcast content is inherently sensitive. It may be difficult to craft a rule that can encompass real abuses without stifling creative programming. We therefore must take care that any rule on hoaxes not prevent the broadcast of programs such as Orson Wells' "War of the Worlds," which is widely recognized as a classic of American radio.

I think the Bureau has done a responsible and praiseworthy job in proposing a model rule, and I look forward to receiving comments so that the Commission may carefully evaluate its ramifications.

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

BSN TELECOM CO. File No. I-T-C-91-213

Application for authority to operate as an international resale carrier.

GTE AIRFONE, INC. File No. I-T-C-91-216

Application for authority to operate as an international resale carrier.

2001 TELECOMMUNICATIONS, INC. File No. I-T-C-91-221

Application for authority to operate as an international resale carrier.

PARAMOUNT COMMUNICATION SYSTEMS, INC. File No. I-T-C-91-222

Application for authority to operate as an international resale carrier.

US FIBER COM NETWORK, INC. File No. I-T-C-91-223

Application for authority to operate as an international resale carrier.

SOUTHEAST PAY TELEPHONE, INC. File No. I-T-C-91-224

Application for authority to operate as an international resale carrier.

ORDER, AUTHORIZATION AND CERTIFICATE

Adopted: November 15, 1991; Released: November 22, 1991

By the Chief, International Facilities Division:

1. Upon consideration of the above-captioned uncontested applications, filed pursuant to Section 214 of the Communications Act of 1934, as amended, IT IS HEREBY CERTIFIED that the present and future public convenience and necessity require the provision of international switched voice service to the general public by BSN Telecom Co. (BSN), GTE Airfone, Inc. (GTEAF), 2001 Telecommunications, Inc. (2001), Paramount Communications Systems, Inc. (PCSI), US Fiber Com Network, Inc. (USF) and Southeast Pay Telephone, Inc. (Southeast).

2. Accordingly, IT IS ORDERED that applications File Nos. I-T-C-91-213, I-T-C-91-216, I-T-C-91-221, I-T-C-91-222, I-T-C-91-223 and I-T-C-91-224 ARE GRANTED; and

a. BSN and GTEAF are authorized to provide international switched voice service by the resale of the international switched voice service set forth in AT&T's Tariff F.C.C. No. 1, MCI's Tariff F.C.C. No. 1, and US Sprint's Tariff F.C.C. No. 1, between the U.S. and the international points listed in those tariffs;

b. 2001, PCSI and Southeast are authorized to provide international switched voice service by the resale of the international switched voice service set forth in Intellicall Operator Services, Inc.'s Tariff F.C.C. No. 1 between the U.S. and the international points listed in that tariff; and

c. USF is authorized to provide international switched voice and data services by the resale of the international voice service set forth in AT&T's Tariffs F.C.C. Nos. 1 and 2 between the U.S. and the international points listed in those tariffs.

3. IT IS FURTHER ORDERED that the applicants shall obtain any necessary operating agreements in each of the countries to which they will provide service and shall file them with the Commission within 30 days of their execution.

4. IT IS FURTHER ORDERED that the applicants shall file tariffs pursuant to Section 203 of the Communications Act, 47 U.S.C. Section 203, and Part 61 of the Commission's Rules, 47 C.F.R. Part 61, for the services authorized in this Order.

5. IT IS FURTHER ORDERED that the applicants shall file the annual reports of overseas telecommunications traffic required by Section 43.61 of the Commission's Rules, 47 C.F.R. §43.61.

6. IT IS FURTHER ORDERED that nothing in this authorization should be construed to include authorization for the transmission of money in connection with the services it seeks authority to provide. The transmission of money is not considered to be a common carrier service. Therefore, nothing in this Order should be construed as containing authority for the transmission of money.

7. This order is issued under Section 0.291 of the Commission's Rules and is effective upon adoption. Petitions for reconsideration under Section 1.106 or applications for review under Section 1.115 of the Commission's Rules may be filed within 30 days of public notice of this order (*see* Section 1.4(b)(2)).

FEDERAL COMMUNICATIONS COMMISSION

George S. Li
Chief, International Facilities Division
Common Carrier Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

NATIONAL RURAL
TELECOMMUNICATIONS
COOPERATIVE,
Complainant,

v. File Nos. E-91-44
E-91-45

SOUTHERN SATELLITE
SYSTEMS, INC.
and NETLINK USA,
Defendants.

In the Matter of

NATIONAL RURAL
TELECOMMUNICATIONS
COOPERATIVE,
Complainant,

v. File No. E-91-46

UNITED VIDEO, INC.,
Defendant.

ORDER

Adopted: November 15, 1991; Released: November 25, 1991

By the Deputy Chief, Enforcement Division, Common Carrier Bureau:

1. By this Order, we address pending motions concerning discovery and other procedural matters in the above-captioned proceedings and establish briefing dates regarding certain factual/legal and jurisdictional threshold issues.

2. On September 23, 1991, the complainant in these proceedings, the National Rural Telecommunications Cooperative (NRTC), filed motions to compel Southern Satellite Systems, Inc. (Southern), Netlink USA (Netlink), and United Video, Inc. (United), (collectively defendants) to provide full and complete responses to certain of the interrogatories that it had filed. NRTC simultaneously filed motions seeking orders that would compel defendants to produce various documents.[1]

3. Thereafter, on November 4, 1991, counsel for the parties met with members of the Common Carrier Bureau's Enforcement Division (staff) to address, *inter alia*, the motions described above. It was agreed that the parties would undertake to resolve certain disputes over discovery that still remained following such meeting and then advise the staff which such disputes, if any, they could not resolve. On November 15, 1991, we were advised that the parties had resolved all of their discovery disputes.

4. The parties' successful efforts to resolve all outstanding discovery disputes obviates the need to formally rule upon the merits of NRTC's pending discovery motions and serves to end contentious litigation. We are requiring the parties to complete any and all further discovery, upon which they have agreed, by no later than December 4, 1991.

5. Further, we agree with United that resolution of the threshold issues of whether the Commission has jurisdiction to entertain the subject complaints and to apply 47 U.S.C. § 202(a) to NRTC's allegations could obviate the necessity to proceed with the other issues raised by the complaints and related pleadings in this matter. Accordingly, we are granting United's motion to bifurcate the proceedings and requiring that, upon completion of discovery concerning such threshold issues, the parties file briefs[2] on the following issues:

> (1) Insofar as defendant (a) Southern Satellite Systems, Inc., (b) Netlink USA, or (c) United Video, Inc. (and/or Superstar Connection)[3] has been engaged in providing domestic satellite services to operators of cable television (cable), satellite master antenna television (SMATV) and/or multipoint distribution (MMDS) systems since January of 1989, has defendant been so engaged as a "[c]ommon carrier" within the meaning of Section 3(h) of the Communications Act, 47 U.S.C. § 153(h)?
>
> (2) Insofar as defendant (a) Southern Satellite Systems, Inc., (b) Netlink USA, or (c) United Video, Inc. (and/or Superstar Connection) has been engaged since January of 1989 in providing services to NRTC in the latter's capacity as a "distributor", within the meaning of Section 119(d)(1) of the Copyright Act, 17 U.S.C. § 119(d)(1), has defendant been so engaged as a "[c]ommon carrier" within the meaning of Section 3(h) of the Communications Act?

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[1] Defendants each timely filed oppositions to such motions on October 11, 1991, and on October 21, 1991, NRTC filed replies to the oppositions to its motions to compel. Also here before us are separate motions for judgment filed by each defendant on October 11, 1991; motions filed by NRTC on October 21, 1991 to strike, or in the alternative, to hold in abeyance defendants' motions for judgment; and each defendant's opposition thereto filed on October 31, 1991.

[2] In such briefs, and optional reply briefs provided for herein, Defendants may incorporate, by specific reference, relevant information and arguments contained in their motions for judgment.

[3] Superstar Connection is a Delaware partnership and is 98% owned by United. According to United, Superstar Connection has assumed full responsibility for providing all of United's home satellite dish (HSD) services, "including superstations, on both a wholesale and retail basis." (footnote omitted) Answer to Amended Formal Complaint at 3.

(3) Irrespective of the answers to issues (1) and (2), above, with respect to any defendant, are the services described in those issues "like communication service" within the meaning of Section 202(a) of the Communications Act?

6. ACCORDINGLY, IT IS ORDERED, pursuant to authority delegated by Section 0.291 of the Commission's Rules, 47 C.F.R. § 0.291, that the motions, filed by NRTC on September 23, 1991 in the above-captioned proceedings, to compel further responses to its interrogatories, ARE DISMISSED.

7. IT IS FURTHER ORDERED that the motions to produce documents, filed by NRTC on September 23, 1990 in these proceedings, ARE DISMISSED.

8. IT IS FURTHER ORDERED that all discovery provided for herein SHALL BE COMPLETED no later than December 4, 1991.

9. IT IS FURTHER ORDERED that the Motion to Bifurcate Proceedings, filed by United Video, Inc. and Superstar Connection on July 11, 1991, IS GRANTED.

10. IT IS FURTHER ORDERED that all parties SHALL FILE BRIEFS on the threshold issues specified in paragraph 5, above, no later than January 22, 1992.

11. IT IS FURTHER ORDERED that all parties MAY FILE REPLY BRIEFS no later than February 24, 1992.

12. IT IS FURTHER ORDERED that motions filed by NRTC on October 21, 1991 to strike or hold in abeyance motions for judgment filed by defendants on October 11, 1991 ARE GRANTED insofar as consistent with this Order and otherwise ARE DENIED.

FEDERAL COMMUNICATIONS COMMISSION

Gregory A. Weiss
Deputy Chief (Operations)
Enforcement Division
Common Carrier Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

Call West — File No. ENF-91-010
Dallas, Texas

Apparent Violations of
Telephone Operator Consumer
Services Improvement Act of 1990

NOTICE OF APPARENT LIABILITY FOR FORFEITURE

Adopted: November 8, 1991; Released: November 25, 1991

By the Commission:

1. By this Notice of Apparent Liability for Forfeiture, we initiate enforcement action against Call West, a provider of operator services (OSP),[1] for apparent violations of the Telephone Operator Consumer Services Improvement Act of 1990, Pub. L. No. 101-435, 104 Stat. 986 (47 U.S.C. § 226) (TOCSIA).

2. TOCSIA was signed into law on October 17, 1990 and, among other things, required that each OSP file an informational tariff with the Commission not later than January 15, 1991,

> specifying rates, terms, and conditions, and including commissions, surcharges, any fees which are collected from consumers, and reasonable estimates of the amount of traffic priced at each rate, with respect to calls for which operator services are provided.

47 U.S.C. § 226(h)(1)(A).[2]

3. In addition to the tariff filing requirement, TOCSIA directs the Commission to monitor and report on OSP rates; determine the extent to which offerings made by OSPs improve operator services available to the public; report on operator service rates, incidence of complaints, and service offerings; consider the effect of commissions and various other costs of doing business on OSP rates; and generally monitor compliance with TOCSIA.[3] To fulfill a number of these statutory requirements, the Commission implemented policies and procedures requiring OSPs to file with the Commission, at specified times, a total of four monitoring reports setting forth: (1) compilations of rates, including sample charges; (2) the incidence of complaints for six specified categories relating to OSP operations; and (3) certain cost data.[4] The first of these monitoring reports, for the period January 1, 1991 through April 30, 1991, was due by June 21, 1991.

4. A review of the informational tariffs and monitoring reports received by the Commission for the January 15, 1991 and June 21, 1991 filing dates indicates that Call West filed the required monitoring report but has apparently failed to file the informational tariff required by Section 226(h)(1)(A) of TOCSIA in the manner set forth in the Public Notice.

5. Based on the foregoing, it appears that Call West has wilfully and repeatedly violated Section 226(h)(1)(A) of TOCSIA by failing to file the required informational tariff with the Commission by January 15, 1991. Under Section 503(b) of the Communications Act, the Commission may impose forfeitures against common carriers up to $100,000 for each violation or each day of a continuing violation in contravention of the Communications Act or rule, regulation or order of the Commission. *See* 47 U.S.C. § 503(b)(2)(B).[5] In the instant case, the apparent failure to file an informational tariff constitutes a continuing violation for each day beyond January 15, 1991 that Call West remains in noncompliance.

6. The Commission has adopted standards for assessing forfeitures in particular cases.[6] Pursuant to the *Policy Statement*, common carriers that are found to be in violation of operator service requirements are subject to a base forfeiture amount of $75,000. This base amount may be adjusted upward or downward depending on a number of factors.[7] In the instant case, the violation has continued for approximately ten months. Consistent with the *Policy Statement*, we are making an upward adjustment of the forfeiture amount to $82,500 given the duration of the violation. We also find, however, that a downward adjustment of the forfeiture amount is appropriate in the instant case. The TOCSIA informational tariff filing requirement is relatively new and imposes, for the first time, an obligation on Call West and other OSPs to make such filings with this Commission. Under these circumstances, we find that a downward adjustment of the forfeiture amount to $52,500 is appropriate.

7. Accordingly, IT IS ORDERED, pursuant to Section 503(b) of the Communications Act, 47 U.S.C. § 503(b), that Call West is HEREBY NOTIFIED of an apparent liability for a forfeiture in the amount of fifty-two thou-

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[1] "Operator services" is defined as

> any interstate telecommunications service initiated from an aggregator location that includes, as a component, any automatic or live assistance to a consumer to arrange for billing or completion, or both, of an interstate telephone call through a method other than --
>
> (A) automatic completion with billing to the telephone from which the call originated; or
>
> (B) completion through an access code used by the consumer, with billing to an account previously established with the carrier by the consumer.

47 U.S.C. § 226(a)(7); 47 C.F.R. § 64.708(g).

[2] The procedures for filing informational tariffs with the Commission are set forth in Section 61.32 of the Commission's rules, 47 C.F.R. § 61.32. *See* Public Notice, 5 FCC Rcd 7444 (Com. Car. Bur. 1990) (Public Notice).

[3] 47 U.S.C. § 226(h)(3)(A).

[4] *Policies and Rules Concerning Operator Service Providers*, Order (Phase II), 6 FCC Rcd 2314 (Com. Car. Bur. 1991).

[5] A forfeiture for any continuing violation involving any single act or failure to act by a common carrier is limited to a maximum of $1,000,000.

[6] *Policy Statement, Standards for Assessing Forfeitures*, 6 FCC Rcd 4695 (1991), *recon. pending*.

[7] *Id.* at 4700.

sand five hundred dollars ($52,500) for willful and repeated violations of Section 226(h)(1)(A) of TOCSIA, 47 U.S.C. § 226(h)(1)(A), in the manner and on the dates described above. The amount specified was determined after consideration of the factors set forth in Section 503(b)(2) of the Communications Act of 1934, as amended.

8. IT IS FURTHER ORDERED, pursuant to Section 1.80(f)(3) of the Commission's rules, 47 C.F.R. § 1.80(f)(3), that Call West shall, within thirty (30) days of release of this Notice, pay the full amount of the forfeiture or file a response showing why the forfeiture should not be imposed or why the proposed forfeiture should be reduced. Such a forfeiture amount shall be paid by check or money order drawn to the order of the Federal Communications Commission. The check or money order should be mailed to the Federal Communications Commission, Post Office Box 73482, Chicago, Illinois 60673-7482. The check or money order must identify the payer and reference File No. ENF-91-010.

9. IT IS FURTHER ORDERED that a copy of this Notice of Apparent Liability for Forfeiture shall be sent by certified mail, return receipt requested, to Call West, Lock Box 11, N113 Love Field Terminal Building, Dallas, Texas 75235.

FEDERAL COMMUNICATIONS COMMISSION

Donna R. Searcy
Secretary

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

Columbus Telephone Company, Inc.
Columbus, Kansas — File No. ENF-91-011

Apparent Violations of
Telephone Operator Consumer
Services Improvement Act of 1990

NOTICE OF APPARENT LIABILITY FOR FORFEITURE

Adopted: November 8, 1991; Released: November 25, 1991

By the Commission:

1. By this Notice of Apparent Liability for Forfeiture, we initiate enforcement action against Columbus Telephone Company, Inc., a provider of operator services (OSP),[1] for apparent violations of the Telephone Operator Consumer Services Improvement Act of 1990, Pub. L. No. 101-435, 104 Stat. 986 (47 U.S.C. § 226) (TOCSIA).

2. TOCSIA was signed into law on October 17, 1990 and, among other things, required that each OSP file an informational tariff with the Commission not later than January 15, 1991,

> specifying rates, terms, and conditions, and including commissions, surcharges, any fees which are collected from consumers, and reasonable estimates of the amount of traffic priced at each rate, with respect to calls for which operator services are provided.

47 U.S.C. § 226(h)(1)(A).[2]

3. In addition to the tariff filing requirement, TOCSIA directs the Commission to monitor and report on OSP rates; determine the extent to which offerings made by OSPs improve operator services available to the public; report on operator service rates, incidence of complaints, and service offerings; consider the effect of commissions and various other costs of doing business on OSP rates; and generally monitor compliance with TOCSIA.[3] To fulfill a number of these statutory requirements, the Commission implemented policies and procedures requiring OSPs to file with the Commission, at specified times, a total of four monitoring reports setting forth: (1) compilations of rates, including sample charges; (2) the incidence of complaints for six specified categories relating to OSP operations; and (3) certain cost data.[4] The first of these monitoring reports, for the period January 1, 1991 through April 30, 1991, was due by June 21, 1991.

4. A review of the informational tariffs and monitoring reports received by the Commission for the January 15, 1991 and June 21, 1991 filing dates indicates that Columbus Telephone Company, Inc. filed the required monitoring report but has apparently failed to file the informational tariff required by Section 226(h)(1)(A) of TOCSIA in the manner set forth in the Public Notice.

5. Based on the foregoing, it appears that Columbus Telephone Company, Inc. has wilfully and repeatedly violated Section 226(h)(1)(A) of TOCSIA by failing to file the required informational tariff with the Commission by January 15, 1991. Under Section 503(b) of the Communications Act, the Commission may impose forfeitures against common carriers up to $100,000 for each violation or each day of a continuing violation in contravention of the Communications Act or rule, regulation or order of the Commission. *See* 47 U.S.C. § 503(b)(2)(B).[5] In the instant case, the apparent failure to file an informational tariff constitutes a continuing violation for each day beyond January 15, 1991 that Columbus Telephone Company, Inc. remains in non-compliance.

6. The Commission has adopted standards for assessing forfeitures in particular cases.[6] Pursuant to the *Policy Statement*, common carriers that are found to be in violation of operator service requirements are subject to a base forfeiture amount of $75,000. This base amount may be adjusted upward or downward depending on a number of factors.[7] In the instant case, the violation has continued for approximately ten months. Consistent with the *Policy Statement*, we are making an upward adjustment of the forfeiture amount to $82,500 given the duration of the violation. We also find, however, that a downward adjustment of the forfeiture amount is appropriate in the instant case. The TOCSIA informational tariff filing requirement is relatively new and imposes, for the first time, an obligation on Columbus Telephone Company, Inc. and other OSPs to make such filings with this Commission. Under these circumstances, we find that a downward adjustment of the forfeiture amount to $52,500 is appropriate.

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[1] "Operator services" is defined as

> any interstate telecommunications service initiated from an aggregator location that includes, as a component, any automatic or live assistance to a consumer to arrange for billing or completion, or both, of an interstate telephone call through a method other than --
>
> (A) automatic completion with billing to the telephone from which the call originated; or
>
> (B) completion through an access code used by the consumer, with billing to an account previously established with the carrier by the consumer.

47 U.S.C. § 226(a)(7); 47 C.F.R. § 64.708(g).

[2] The procedures for filing informational tariffs with the Commission are set forth in Section 61.32 of the Commission's rules, 47 C.F.R. § 61.32. *See* Public Notice, 5 FCC Rcd 7444 (Com. Car. Bur. 1990) (Public Notice).

[3] 47 U.S.C. § 226(h)(3)(A).

[4] *Policies and Rules Concerning Operator Service Providers*, Order (Phase II), 6 FCC Rcd 2314 (Com. Car. Bur. 1991).

[5] A forfeiture for any continuing violation involving any single act or failure to act by a common carrier is limited to a maximum of $1,000,000.

[6] *Policy Statement, Standards for Assessing Forfeitures*, 6 FCC Rcd 4695 (1991), *recon. pending*.

[7] *Id.* at 4700.

7. Accordingly, IT IS ORDERED, pursuant to Section 503(b) of the Communications Act, 47 U.S.C. § 503(b), that Columbus Telephone Company, Inc. is HEREBY NOTIFIED of an apparent liability for a forfeiture in the amount of fifty-two thousand five hundred dollars ($52,500) for willful and repeated violations of Section 226(h)(1)(A) of TOCSIA, 47 U.S.C. § 226(h)(1)(A), in the manner and on the dates described above. The amount specified was determined after consideration of the factors set forth in Section 503(b)(2) of the Communications Act of 1934, as amended.

8. IT IS FURTHER ORDERED, pursuant to Section 1.80(f)(3) of the Commission's rules, 47 C.F.R. § 1.80(f)(3), that Columbus Telephone Company, Inc. shall, within thirty (30) days of release of this Notice, pay the full amount of the forfeiture or file a response showing why the forfeiture should not be imposed or why the proposed forfeiture should be reduced. Such a forfeiture amount shall be paid by check or money order drawn to the order of the Federal Communications Commission. The check or money order should be mailed to the Federal Communications Commission, Post Office Box 73482, Chicago, Illinois 60673-7482. The check or money order must identify the payer and reference File No. ENF-91-011.

9. IT IS FURTHER ORDERED that a copy of this Notice of Apparent Liability for Forfeiture shall be sent by certified mail, return receipt requested, to Columbus Telephone Company, Inc., 224 South Kansas Avenue, Columbus, Kansas 66725.

FEDERAL COMMUNICATIONS COMMISSION

Donna R. Searcy
Secretary

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

Northeast Phone Systems, Inc.
Schenectady, New York

File No. ENF-91-012

Apparent Violations of
Telephone Operator Consumer
Services Improvement Act of 1990

NOTICE OF APPARENT LIABILITY FOR FORFEITURE

Adopted: November 8, 1991; Released: November 25, 1991

By the Commission:

1. By this Notice of Apparent Liability for Forfeiture, we initiate enforcement action against Northeast Phone Systems, Inc., a provider of operator services (OSP),[1] for apparent violations of the Telephone Operator Consumer Services Improvement Act of 1990, Pub. L. No. 101-435, 104 Stat. 986 (47 U.S.C. § 226) (TOCSIA).

2. TOCSIA was signed into law on October 17, 1990 and, among other things, required that each OSP file an informational tariff with the Commission not later than January 15, 1991,

> specifying rates, terms, and conditions, and including commissions, surcharges, any fees which are collected from consumers, and reasonable estimates of the amount of traffic priced at each rate, with respect to calls for which operator services are provided.

47 U.S.C. § 226(h)(1)(A).[2]

3. In addition to the tariff filing requirement, TOCSIA directs the Commission to monitor and report on OSP rates; determine the extent to which offerings made by OSPs improve operator services available to the public; report on operator service rates, incidence of complaints, and service offerings; consider the effect of commissions and various other costs of doing business on OSP rates; and generally monitor compliance with TOCSIA.[3] To fulfill a number of these statutory requirements, the Commission implemented policies and procedures requiring OSPs to file with the Commission, at specified times, a total of four monitoring reports setting forth: (1) compilations of rates, including sample charges; (2) the incidence of complaints for six specified categories relating to OSP operations; and (3) certain cost data.[4] The first of these monitoring reports, for the period January 1, 1991 through April 30, 1991, was due by June 21, 1991.

4. A review of the informational tariffs and monitoring reports received by the Commission for the January 15, 1991 and June 21, 1991 filing dates indicates that Northeast Phone Systems, Inc. filed the required monitoring report but has apparently failed to file the informational tariff required by Section 226(h)(1)(A) of TOCSIA in the manner set forth in the Public Notice.

5. Based on the foregoing, it appears that Northeast Phone Systems, Inc. has wilfully and repeatedly violated Section 226(h)(1)(A) of TOCSIA by failing to file the required informational tariff with the Commission by January 15, 1991. Under Section 503(b) of the Communications Act, the Commission may impose forfeitures against common carriers up to $100,000 for each violation or each day of a continuing violation in contravention of the Communications Act or rule, regulation or order of the Commission. *See* 47 U.S.C. § 503(b)(2)(B).[5] In the instant case, the apparent failure to file an informational tariff constitutes a continuing violation for each day beyond January 15, 1991 that Northeast Phone Systems, Inc. remains in non-compliance.

6. The Commission has adopted standards for assessing forfeitures in particular cases.[6] Pursuant to the *Policy Statement*, common carriers that are found to be in violation of operator service requirements are subject to a base forfeiture amount of $75,000. This base amount may be adjusted upward or downward depending on a number of factors.[7] In the instant case, the violation has continued for approximately ten months. Consistent with the *Policy Statement*, we are making an upward adjustment of the forfeiture amount to $82,500 given the duration of the violation. We also find, however, that a downward adjustment of the forfeiture amount is appropriate in the instant case. The TOCSIA informational tariff filing requirement is relatively new and imposes, for the first

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[1] "Operator services" is defined as

> any interstate telecommunications service initiated from an aggregator location that includes, as a component, any automatic or live assistance to a consumer to arrange for billing or completion, or both, of an interstate telephone call through a method other than --
>
> (A) automatic completion with billing to the telephone from which the call originated; or
>
> (B) completion through an access code used by the consumer, with billing to an account previously established with the carrier by the consumer.

47 U.S.C. § 226(a)(7); 47 C.F.R. § 64.708(g).

[2] The procedures for filing informational tariffs with the Commission are set forth in Section 61.32 of the Commission's rules, 47 C.F.R. § 61.32. *See* Public Notice, 5 FCC Rcd 7444 (Com. Car. Bur. 1990) (Public Notice).

[3] 47 U.S.C. § 226(h)(3)(A).

[4] *Policies and Rules Concerning Operator Service Providers*, Order (Phase II), 6 FCC Rcd 2314 (Com. Car. Bur. 1991).

[5] A forfeiture for any continuing violation involving any single act or failure to act by a common carrier is limited to a maximum of $1,000,000.

[6] *Policy Statement, Standards for Assessing Forfeitures*, 6 FCC Rcd 4695 (1991), *recon. pending*.

[7] *Id.* at 4700.

time, an obligation on Northeast Phone Systems, Inc. and other OSPs to make such filings with this Commission. Under these circumstances, we find that a downward adjustment of the forfeiture amount to $52,500 is appropriate.

7. Accordingly, IT IS ORDERED, pursuant to Section 503(b) of the Communications Act, 47 U.S.C. § 503(b), that Northeast Phone Systems, Inc. is HEREBY NOTIFIED of an apparent liability for a forfeiture in the amount of fifty-two thousand five hundred dollars ($52,500) for willful and repeated violations of Section 226(h)(1)(A) of TOCSIA, 47 U.S.C. § 226(h)(1)(A), in the manner and on the dates described above. The amount specified was determined after consideration of the factors set forth in Section 503(b)(2) of the Communications Act of 1934, as amended.

8. IT IS FURTHER ORDERED, pursuant to Section 1.80(f)(3) of the Commission's rules, 47 C.F.R. § 1.80(f)(3), that Northeast Phone Systems, Inc. shall, within thirty (30) days of release of this Notice, pay the full amount of the forfeiture or file a response showing why the forfeiture should not be imposed or why the proposed forfeiture should be reduced. Such a forfeiture amount shall be paid by check or money order drawn to the order of the Federal Communications Commission. The check or money order should be mailed to the Federal Communications Commission, Post Office Box 73482, Chicago, Illinois 60673-7482. The check or money order must identify the payer and reference File No. ENF-91-012.

9. IT IS FURTHER ORDERED that a copy of this Notice of Apparent Liability for Forfeiture shall be sent by certified mail, return receipt requested, to Northeast Phone Systems, Inc., 1921 Broadway, Schenectady, New York 12306.

FEDERAL COMMUNICATIONS COMMISSION

Donna R. Searcy
Secretary

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

National File No. ENF-91-013
Tele-Sav, Inc.
Myrtle Beach, South Carolina

Apparent Violations of
Telephone Operator Consumer
Services Improvement Act of 1990

NOTICE OF APPARENT LIABILITY FOR FORFEITURE

Adopted: November 8, 1991; Released: November 25, 1991

By the Commission:

1. By this Notice of Apparent Liability for Forfeiture, we initiate enforcement action against National Tele-Sav, Inc., a provider of operator services (OSP),[1] for apparent violations of the Telephone Operator Consumer Services Improvement Act of 1990, Pub. L. No. 101-435, 104 Stat. 986 (47 U.S.C. § 226) (TOCSIA).

2. TOCSIA was signed into law on October 17, 1990 and, among other things, required that each OSP file an informational tariff with the Commission not later than January 15, 1991,

> specifying rates, terms, and conditions, and including commissions, surcharges, any fees which are collected from consumers, and reasonable estimates of the amount of traffic priced at each rate, with respect to calls for which operator services are provided.

47 U.S.C. § 226(h)(1)(A).[2]

3. In addition to the tariff filing requirement, TOCSIA directs the Commission to monitor and report on OSP rates; determine the extent to which offerings made by OSPs improve operator services available to the public; report on operator service rates, incidence of complaints, and service offerings; consider the effect of commissions and various other costs of doing business on OSP rates; and generally monitor compliance with TOCSIA.[3] To fulfill a number of these statutory requirements, the Commission implemented policies and procedures requiring OSPs to file with the Commission, at specified times, a total of four monitoring reports setting forth: (1) compilations of rates, including sample charges; (2) the incidence of complaints for six specified categories relating to OSP operations; and (3) certain cost data.[4] The first of these monitoring reports, for the period January 1, 1991 through April 30, 1991, was due by June 21, 1991.

4. A review of the informational tariffs and monitoring reports received by the Commission for the January 15, 1991 and June 21, 1991 filing dates indicates that National Tele-Sav, Inc. filed the required monitoring report but has apparently failed to file the informational tariff required by Section 226(h)(1)(A) of TOCSIA in the manner set forth in the Public Notice.

5. Based on the foregoing, it appears that National TeleSav, Inc. has wilfully and repeatedly violated Section 226(h)(1)(A) of TOCSIA by failing to file the required informational tariff with the Commission by January 15, 1991. Under Section 503(b) of the Communications Act, the Commission may impose forfeitures against common carriers up to $100,000 for each violation or each day of a continuing violation in contravention of the Communications Act or rule, regulation or order of the Commission. *See* 47 U.S.C. § 503(b)(2)(B).[5] In the instant case, the apparent failure to file an informational tariff constitutes a continuing violation for each day beyond January 15, 1991 that National Tele-Sav, Inc. remains in noncompliance.

6. The Commission has adopted standards for assessing forfeitures in particular cases.[6] Pursuant to the *Policy Statement*, common carriers that are found to be in violation of operator service requirements are subject to a base forfeiture amount of $75,000. This base amount may be adjusted upward or downward depending on a number of factors.[7] In the instant case, the violation has continued for approximately ten months. Consistent with the *Policy Statement*, we are making an upward adjustment of the forfeiture amount to $82,500 given the duration of the violation. We also find, however, that a downward adjustment of the forfeiture amount is appropriate in the instant case. The TOCSIA informational tariff filing requirement is relatively new and imposes, for the first time, an obligation on National Tele-Sav, Inc. and other OSPs to make such filings with this Commission. Under these circumstances, we find that a downward adjustment of the forfeiture amount to $52,500 is appropriate.

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[1] "Operator services" is defined as

> any interstate telecommunications service initiated from an aggregator location that includes, as a component, any automatic or live assistance to a consumer to arrange for billing or completion, or both, of an interstate telephone call through a method other than --
>
> (A) automatic completion with billing to the telephone from which the call originated; or
>
> (B) completion through an access code used by the consumer, with billing to an account previously established with the carrier by the consumer.

47 U.S.C. § 226(a)(7); 47 C.F.R. § 64.708(g).

[2] The procedures for filing informational tariffs with the Commission are set forth in Section 61.32 of the Commission's rules, 47 C.F.R. § 61.32. *See* Public Notice, 5 FCC Rcd 7444 (Com. Car. Bur. 1990) (Public Notice).

[3] 47 U.S.C. § 226(h)(3)(A).

[4] *Policies and Rules Concerning Operator Service Providers*, Order (Phase II), 6 FCC Rcd 2314 (Com. Car. Bur. 1991).

[5] A forfeiture for any continuing violation involving any single act or failure to act by a common carrier is limited to a maximum of $1,000,000.

[6] *Policy Statement, Standards for Assessing Forfeitures*, 6 FCC Rcd 4695 (1991), *recon. pending*.

[7] *Id.* at 4700.

7. Accordingly, IT IS ORDERED, pursuant to Section 503(b) of the Communications Act, 47 U.S.C. § 503(b), that National Tele-Sav, Inc. is HEREBY NOTIFIED of an apparent liability for a forfeiture in the amount of fifty-two thousand five hundred dollars ($52,500) for willful and repeated violations of Section 226(h)(1)(A) of TOCSIA, 47 U.S.C. § 226(h)(1)(A), in the manner and on the dates described above. The amount specified was determined after consideration of the factors set forth in Section 503(b)(2) of the Communications Act of 1934, as amended.

8. IT IS FURTHER ORDERED, pursuant to Section 1.80(f)(3) of the Commission's rules, 47 C.F.R. § 1.80(f)(3), that National Tele-Sav, Inc. shall, within thirty (30) days of release of this Notice, pay the full amount of the forfeiture or file a response showing why the forfeiture should not be imposed or why the proposed forfeiture should be reduced. Such a forfeiture amount shall be paid by check or money order drawn to the order of the Federal Communications Commission. The check or money order should be mailed to the Federal Communications Commission, Post Office Box 73482, Chicago, Illinois 60673-7482. The check or money order must identify the payer and reference File No. ENF-91-013.

9. IT IS FURTHER ORDERED that a copy of this Notice of Apparent Liability for Forfeiture shall be sent by certified mail, return receipt requested, to National Tele-Sav, Inc., 1601 Oak Street, Suite 405, Myrtle Beach, South Carolina 29577.

FEDERAL COMMUNICATIONS COMMISSION

Donna R. Searcy
Secretary

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

Payline Systems, Inc. File No. ENF-91-014
Portland, Oregon

Apparent Violations of
Telephone Operator Consumer
Services Improvement Act of 1990

NOTICE OF APPARENT LIABILITY FOR FORFEITURE

Adopted: November 8, 1991; Released: November 25, 1991

By the Commission:

1. By this Notice of Apparent Liability for Forfeiture, we initiate enforcement action against Payline Systems, Inc., a provider of operator services (OSP),[1] for apparent violations of the Telephone Operator Consumer Services Improvement Act of 1990, Pub. L. No. 101-435, 104 Stat. 986 (47 U.S.C. § 226) (TOCSIA).

2. TOCSIA was signed into law on October 17, 1990 and, among other things, required that each OSP file an informational tariff with the Commission not later than January 15, 1991,

> specifying rates, terms, and conditions, and including commissions, surcharges, any fees which are collected from consumers, and reasonable estimates of the amount of traffic priced at each rate, with respect to calls for which operator services are provided.

47 U.S.C. § 226(h)(1)(A).[2]

3. In addition to the tariff filing requirement, TOCSIA directs the Commission to monitor and report on OSP rates; determine the extent to which offerings made by OSPs improve operator services available to the public; report on operator service rates, incidence of complaints, and service offerings; consider the effect of commissions and various other costs of doing business on OSP rates; and generally monitor compliance with TOCSIA.[3] To fulfill a number of these statutory requirements, the Commission implemented policies and procedures requiring OSPs to file with the Commission, at specified times, a total of four monitoring reports setting forth: (1) compilations of rates, including sample charges; (2) the incidence of complaints for six specified categories relating to OSP operations; and (3) certain cost data.[4] The first of these monitoring reports, for the period January 1, 1991 through April 30, 1991, was due by June 21, 1991.

4. A review of the informational tariffs and monitoring reports received by the Commission for the January 15, 1991 and June 21, 1991 filing dates indicates that Payline Systems, Inc. filed the required monitoring report but has apparently failed to file the informational tariff required by Section 226(h)(1)(A) of TOCSIA in the manner set forth in the Public Notice.

5. Based on the foregoing, it appears that Payline Systems, Inc. has wilfully and repeatedly violated Section 226(h)(1)(A) of TOCSIA by failing to file the required informational tariff with the Commission by January 15, 1991. Under Section 503(b) of the Communications Act, the Commission may impose forfeitures against common carriers up to $100,000 for each violation or each day of a continuing violation in contravention of the Communications Act or rule, regulation or order of the Commission. *See* 47 U.S.C. § 503(b)(2)(B).[5] In the instant case, the apparent failure to file an informational tariff constitutes a continuing violation for each day beyond January 15, 1991 that Payline Systems, Inc. remains in non-compliance.

6. The Commission has adopted standards for assessing forfeitures in particular cases.[6] Pursuant to the *Policy Statement*, common carriers that are found to be in violation of operator service requirements are subject to a base forfeiture amount of $75,000. This base amount may be adjusted upward or downward depending on a number of factors.[7] In the instant case, the violation has continued for approximately ten months. Consistent with the *Policy Statement*, we are making an upward adjustment of the forfeiture amount to $82,500 given the duration of the violation. We also find, however, that a downward adjustment of the forfeiture amount is appropriate in the instant case. The TOCSIA informational tariff filing requirement is relatively new and imposes, for the first time, an obligation on Payline Systems, Inc. and other

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[1] "Operator services" is defined as

> any interstate telecommunications service initiated from an aggregator location that includes, as a component, any automatic or live assistance to a consumer to arrange for billing or completion, or both, of an interstate telephone call through a method other than --
>
> (A) automatic completion with billing to the telephone from which the call originated; or
>
> (B) completion through an access code used by the consumer, with billing to an account previously established with the carrier by the consumer.

47 U.S.C. § 226(a)(7); 47 C.F.R. § 64.708(g).

[2] The procedures for filing informational tariffs with the Commission are set forth in Section 61.32 of the Commission's rules, 47 C.F.R. § 61.32. *See* Public Notice, 5 FCC Rcd 7444 (Com. Car. Bur. 1990) (Public Notice).

[3] 47 U.S.C. § 226(h)(3)(A).

[4] *Policies and Rules Concerning Operator Service Providers*, Order (Phase II), 6 FCC Rcd 2314 (Com. Car. Bur. 1991).

[5] A forfeiture for any continuing violation involving any single act or failure to act by a common carrier is limited to a maximum of $1,000,000.

[6] *Policy Statement, Standards for Assessing Forfeitures*, 6 FCC Rcd 4695 (1991), *recon. pending*.

[7] *Id.* at 4700.

OSPs to make such filings with this Commission. Under these circumstances, we find that a downward adjustment of the forfeiture amount to $52,500 is appropriate.

7. Accordingly, IT IS ORDERED, pursuant to Section 503(b) of the Communications Act, 47 U.S.C. § 503(b), that Payline Systems, Inc. is HEREBY NOTIFIED of an apparent liability for a forfeiture in the amount of fifty-two thousand five hundred dollars ($52,500) for willful and repeated violations of Section 226(h)(1)(A) of TOCSIA, 47 U.S.C. § 226(h)(1)(A), in the manner and on the dates described above. The amount specified was determined after consideration of the factors set forth in Section 503(b)(2) of the Communications Act of 1934, as amended.

8. IT IS FURTHER ORDERED, pursuant to Section 1.80(f)(3) of the Commission's rules, 47 C.F.R. § 1.80(f)(3), that Payline Systems, Inc. shall, within thirty (30) days of release of this Notice, pay the full amount of the forfeiture or file a response showing why the forfeiture should not be imposed or why the proposed forfeiture should be reduced. Such a forfeiture amount shall be paid by check or money order drawn to the order of the Federal Communications Commission. The check or money order should be mailed to the Federal Communications Commission, Post Office Box 73482, Chicago, Illinois 60673-7482. The check or money order must identify the payer and reference File No. ENF-91-014.

9. IT IS FURTHER ORDERED that a copy of this Notice of Apparent Liability for Forfeiture shall be sent by certified mail, return receipt requested, to Payline Systems, Inc., 921 SW Washington, Suite 250, Portland, Oregon 97205.

FEDERAL COMMUNICATIONS COMMISSION

Donna R. Searcy
Secretary

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

Payphone Systems — File No. ENF-91-015
Redding, California

Apparent Violations of
Telephone Operator Consumer
Services Improvement Act of 1990

NOTICE OF APPARENT LIABILITY FOR FORFEITURE

Adopted: November 8, 1991; Released: November 25, 1991

By the Commission:

1. By this Notice of Apparent Liability for Forfeiture, we initiate enforcement action against Payphone Systems, a provider of operator services (OSP),[1] for apparent violations of the Telephone Operator Consumer Services Improvement Act of 1990, Pub. L. No. 101-435, 104 Stat. 986 (47 U.S.C. § 226) (TOCSIA).

2. TOCSIA was signed into law on October 17, 1990 and, among other things, required that each OSP file an informational tariff with the Commission not later than January 15, 1991,

> specifying rates, terms, and conditions, and including commissions, surcharges, any fees which are collected from consumers, and reasonable estimates of the amount of traffic priced at each rate, with respect to calls for which operator services are provided.

47 U.S.C. § 226(h)(1)(A).[2]

3. In addition to the tariff filing requirement, TOCSIA directs the Commission to monitor and report on OSP rates; determine the extent to which offerings made by OSPs improve operator services available to the public; report on operator service rates, incidence of complaints, and service offerings; consider the effect of commissions and various other costs of doing business on OSP rates; and generally monitor compliance with TOCSIA.[3] To fulfill a number of these statutory requirements, the Commission implemented policies and procedures requiring OSPs to file with the Commission, at specified times, a total of four monitoring reports setting forth: (1) compilations of rates, including sample charges; (2) the incidence of complaints for six specified categories relating to OSP operations; and (3) certain cost data.[4] The first of these monitoring reports, for the period January 1, 1991 through April 30, 1991, was due by June 21, 1991.

4. A review of the informational tariffs and monitoring reports received by the Commission for the January 15, 1991 and June 21, 1991 filing dates indicates that Payphone Systems filed the required monitoring report but has apparently failed to file the informational tariff required by Section 226(h)(1)(A) of TOCSIA in the manner set forth in the Public Notice.

5. Based on the foregoing, it appears that Payphone Systems has wilfully and repeatedly violated Section 226(h)(1)(A) of TOCSIA by failing to file the required informational tariff with the Commission by January 15, 1991. Under Section 503(b) of the Communications Act, the Commission may impose forfeitures against common carriers up to $100,000 for each violation or each day of a continuing violation in contravention of the Communications Act or rule, regulation or order of the Commission. *See* 47 U.S.C. § 503(b)(2)(B).[5] In the instant case, the apparent failure to file an informational tariff constitutes a continuing violation for each day beyond January 15, 1991 that Payphone Systems remains in non-compliance.

6. The Commission has adopted standards for assessing forfeitures in particular cases.[6] Pursuant to the *Policy Statement*, common carriers that are found to be in violation of operator service requirements are subject to a base forfeiture amount of $75,000. This base amount may be adjusted upward or downward depending on a number of factors.[7] In the instant case, the violation has continued for approximately ten months. Consistent with the *Policy Statement*, we are making an upward adjustment of the forfeiture amount to $82,500 given the duration of the violation. We also find, however, that a downward adjustment of the forfeiture amount is appropriate in the instant case. The TOCSIA informational tariff filing requirement is relatively new and imposes, for the first time, an obligation on Payphone Systems and other OSPs to make such filings with this Commission. Under these circumstances, we find that a downward adjustment of the forfeiture amount to $52,500 is appropriate.

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[1] "Operator services" is defined as

> any interstate telecommunications service initiated from an aggregator location that includes, as a component, any automatic or live assistance to a consumer to arrange for billing or completion, or both, of an interstate telephone call through a method other than --
>
> (A) automatic completion with billing to the telephone from which the call originated; or
>
> (B) completion through an access code used by the consumer, with billing to an account previously established with the carrier by the consumer.

47 U.S.C. § 226(a)(7); 47 C.F.R. § 64.708(g).

[2] The procedures for filing informational tariffs with the Commission are set forth in Section 61.32 of the Commission's rules, 47 C.F.R. § 61.32. *See* Public Notice, 5 FCC Rcd 7444 (Com. Car. Bur. 1990) (Public Notice).

[3] 47 U.S.C. § 226(h)(3)(A).

[4] *Policies and Rules Concerning Operator Service Providers*, Order (Phase II), 6 FCC Rcd 2314 (Com. Car. Bur. 1991).

[5] A forfeiture for any continuing violation involving any single act or failure to act by a common carrier is limited to a maximum of $1,000,000.

[6] *Policy Statement, Standards for Assessing Forfeitures*, 6 FCC Rcd 4695 (1991), *recon. pending*.

[7] *Id.* at 4700.

7. Accordingly, IT IS ORDERED, pursuant to Section 503(b) of the Communications Act, 47 U.S.C. § 503(b), that Payphone Systems is HEREBY NOTIFIED of an apparent liability for a forfeiture in the amount of fifty-two thousand five hundred dollars ($52,500) for willful and repeated violations of Section 226(h)(1)(A) of TOCSIA, 47 U.S.C. § 226(h)(1)(A), in the manner and on the dates described above. The amount specified was determined after consideration of the factors set forth in Section 503(b)(2) of the Communications Act of 1934, as amended.

8. IT IS FURTHER ORDERED, pursuant to Section 1.80(f)(3) of the Commission's rules, 47 C.F.R. § 1.80(f)(3), that Payphone Systems shall, within thirty (30) days of release of this Notice, pay the full amount of the forfeiture or file a response showing why the forfeiture should not be imposed or why the proposed forfeiture should be reduced. Such a forfeiture amount shall be paid by check or money order drawn to the order of the Federal Communications Commission. The check or money order should be mailed to the Federal Communications Commission, Post Office Box 73482, Chicago, Illinois 60673-7482. The check or money order must identify the payer and reference File No. ENF-91-015.

9. IT IS FURTHER ORDERED that a copy of this Notice of Apparent Liability for Forfeiture shall be sent by certified mail, return receipt requested, to Payphone Systems, 4554 Caterpillar Road, P.O. Box 4635, Redding, California 96099.

FEDERAL COMMUNICATIONS COMMISSION

Donna R. Searcy
Secretary

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

S.I./C-T Coin Telephone, Inc. Chattanooga, Tennessee — File No. ENF-91-016

Apparent Violations of
Telephone Operator Consumer
Services Improvement Act of 1990

NOTICE OF APPARENT LIABILITY FOR FORFEITURE

Adopted: November 8, 1991; Released: November 25, 1991

By the Commission:

1. By this Notice of Apparent Liability for Forfeiture, we initiate enforcement action against S.I./C-T Coin Telephone, Inc., a provider of operator services (OSP),[1] for apparent violations of the Telephone Operator Consumer Services Improvement Act of 1990, Pub. L. No. 101-435, 104 Stat. 986 (47 U.S.C. § 226) (TOCSIA).

2. TOCSIA was signed into law on October 17, 1990 and, among other things, required that each OSP file an informational tariff with the Commission not later than January 15, 1991,

> specifying rates, terms, and conditions, and including commissions, surcharges, any fees which are collected from consumers, and reasonable estimates of the amount of traffic priced at each rate, with respect to calls for which operator services are provided.

47 U.S.C. § 226(h)(1)(A).[2]

3. In addition to the tariff filing requirement, TOCSIA directs the Commission to monitor and report on OSP rates; determine the extent to which offerings made by OSPs improve operator services available to the public; report on operator service rates, incidence of complaints, and service offerings; consider the effect of commissions and various other costs of doing business on OSP rates; and generally monitor compliance with TOCSIA.[3] To fulfill a number of these statutory requirements, the Commission implemented policies and procedures requiring OSPs to file with the Commission, at specified times, a total of four monitoring reports setting forth: (1) compilations of rates, including sample charges; (2) the incidence of complaints for six specified categories relating to OSP operations; and (3) certain cost data.[4] The first of these monitoring reports, for the period January 1, 1991 through April 30, 1991, was due by June 21, 1991.

4. A review of the informational tariffs and monitoring reports received by the Commission for the January 15, 1991 and June 21, 1991 filing dates indicates that S.I./C-T Coin Telephone, Inc. filed the required monitoring report but has apparently failed to file the informational tariff required by Section 226(h)(1)(A) of TOCSIA in the manner set forth in the Public Notice.

5. Based on the foregoing, it appears that S.I./C-T Coin Telephone, Inc. has wilfully and repeatedly violated Section 226(h)(1)(A) of TOCSIA by failing to file the required informational tariff with the Commission by January 15, 1991. Under Section 503(b) of the Communications Act, the Commission may impose forfeitures against common carriers up to $100,000 for each violation or each day of a continuing violation in contravention of the Communications Act or rule, regulation or order of the Commission. *See* 47 U.S.C. § 503(b)(2)(B).[5] In the instant case, the apparent failure to file an informational tariff constitutes a continuing violation for each day beyond January 15, 1991 that S.I./C-T Coin Telephone, Inc. remains in non-compliance.

6. The Commission has adopted standards for assessing forfeitures in particular cases.[6] Pursuant to the *Policy Statement*, common carriers that are found to be in violation of operator service requirements are subject to a base forfeiture amount of $75,000. This base amount may be adjusted upward or downward depending on a number of factors.[7] In the instant case, the violation has continued for approximately ten months. Consistent with the *Policy Statement*, we are making an upward adjustment of the forfeiture amount to $82,500 given the duration of the violation. We also find, however, that a downward adjustment of the forfeiture amount is appropriate in the instant case. The TOCSIA informational tariff filing requirement is relatively new and imposes, for the first time, an obligation on S.I./C-T Coin Telephone, Inc. and other OSPs to make such filings with this Commission.

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[1] "Operator services" is defined as

> any interstate telecommunications service initiated from an aggregator location that includes, as a component, any automatic or live assistance to a consumer to arrange for billing or completion, or both, of an interstate telephone call through a method other than --
>
> (A) automatic completion with billing to the telephone from which the call originated; or
>
> (B) completion through an access code used by the consumer, with billing to an account previously established with the carrier by the consumer.

47 U.S.C. § 226(a)(7); 47 C.F.R. § 64.708(g).

[2] The procedures for filing informational tariffs with the Commission are set forth in Section 61.32 of the Commission's rules, 47 C.F.R. § 61.32. *See* Public Notice, 5 FCC Rcd 7444 (Com. Car. Bur. 1990) (Public Notice).

[3] 47 U.S.C. § 226(h)(3)(A).

[4] *Policies and Rules Concerning Operator Service Providers*, Order (Phase II), 6 FCC Rcd 2314 (Com. Car. Bur. 1991).

[5] A forfeiture for any continuing violation involving any single act or failure to act by a common carrier is limited to a maximum of $1,000,000.

[6] *Policy Statement, Standards for Assessing Forfeitures*, 6 FCC Rcd 4695 (1991), *recon. pending*.

[7] *Id.* at 4700.

Under these circumstances, we find that a downward adjustment of the forfeiture amount to $52,500 is appropriate.

7. Accordingly, IT IS ORDERED, pursuant to Section 503(b) of the Communications Act, 47 U.S.C. § 503(b), that S.I./C-T Coin Telephone, Inc. is HEREBY NOTIFIED of an apparent liability for a forfeiture in the amount of fifty-two thousand five hundred dollars ($52,500) for willful and repeated violations of Section 226(h)(1)(A) of TOCSIA, 47 U.S.C. § 226(h)(1)(A), in the manner and on the dates described above. The amount specified was determined after consideration of the factors set forth in Section 503(b)(2) of the Communications Act of 1934, as amended.

8. IT IS FURTHER ORDERED, pursuant to Section 1.80(f)(3) of the Commission's rules, 47 C.F.R. § 1.80(f)(3), that S.I./C-T Coin Telephone, Inc. shall, within thirty (30) days of release of this Notice, pay the full amount of the forfeiture or file a response showing why the forfeiture should not be imposed or why the proposed forfeiture should be reduced. Such a forfeiture amount shall be paid by check or money order drawn to the order of the Federal Communications Commission. The check or money order should be mailed to the Federal Communications Commission, Post Office Box 73482, Chicago, Illinois 60673-7482. The check or money order must identify the payer and reference File No. ENF-91-016.

9. IT IS FURTHER ORDERED that a copy of this Notice of Apparent Liability for Forfeiture shall be sent by certified mail, return receipt requested, to S.I./C-T Coin Telephone, Inc., 210 West Main Street, Chattanooga, Tennessee 37408.

FEDERAL COMMUNICATIONS COMMISSION

Donna R. Searcy
Secretary

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

Telefonica Larga Distancia de Puerto Rico — File No. ENF-91-017

Apparent Violations of
Telephone Operator Consumer
Services Improvement Act of 1990

NOTICE OF APPARENT LIABILITY FOR FORFEITURE

Adopted: November 8, 1991; Released: November 25, 1991

By the Commission:

1. By this Notice of Apparent Liability for Forfeiture, we initiate enforcement action against Telefonica Larga Distancia de Puerto Rico (Telefonica Larga Distancia), a provider of operator services (OSP),[1] for apparent violations of the Telephone Operator Consumer Services Improvement Act of 1990, Pub. L. No. 101-435, 104 Stat. 986 (47 U.S.C. § 226) (TOCSIA).

2. TOCSIA was signed into law on October 17, 1990 and, among other things, required that each OSP file an informational tariff with the Commission not later than January 15, 1991,

> specifying rates, terms, and conditions, and including commissions, surcharges, any fees which are collected from consumers, and reasonable estimates of the amount of traffic priced at each rate, with respect to calls for which operator services are provided.

47 U.S.C. § 226(h)(1)(A).[2]

3. In addition to the tariff filing requirement, TOCSIA directs the Commission to monitor and report on OSP rates; determine the extent to which offerings made by OSPs improve operator services available to the public; report on operator service rates, incidence of complaints, and service offerings; consider the effect of commissions and various other costs of doing business on OSP rates; and generally monitor compliance with TOCSIA.[3] To fulfill a number of these statutory requirements, the Commission implemented policies and procedures requiring OSPs to file with the Commission, at specified times, a total of four monitoring reports setting forth: (1) compilations of rates, including sample charges; (2) the incidence of complaints for six specified categories relating to OSP operations; and (3) certain cost data.[4] The first of these monitoring reports, for the period January 1, 1991 through April 30, 1991, was due by June 21, 1991.

4. A review of the informational tariffs and monitoring reports received by the Commission for the January 15, 1991 and June 21, 1991 filing dates indicates that Telefonica Larga Distancia filed the required monitoring report but has apparently failed to file the informational tariff required by Section 226(h)(1)(A) of TOCSIA in the manner set forth in the Public Notice.

5. Based on the foregoing, it appears that Telefonica Larga Distancia has wilfully and repeatedly violated Section 226(h)(1)(A) of TOCSIA by failing to file the required informational tariff with the Commission by January 15, 1991. Under Section 503(b) of the Communications Act, the Commission may impose forfeitures against common carriers up to $100,000 for each violation or each day of a continuing violation in contravention of the Communications Act or rule, regulation or order of the Commission. *See* 47 U.S.C. § 503(b)(2)(B).[5] In the instant case, the apparent failure to file an informational tariff constitutes a continuing violation for each day beyond January 15, 1991 that Telefonica Larga Distancia remains in non-compliance.

6. The Commission has adopted standards for assessing forfeitures in particular cases.[6] Pursuant to the *Policy Statement*, common carriers that are found to be in violation of operator service requirements are subject to a base forfeiture amount of $75,000. This base amount may be adjusted upward or downward depending on a number of factors.[7] In the instant case, the violation has continued for approximately ten months. Consistent with the *Policy Statement*, we are making an upward adjustment of the forfeiture amount to $82,500 given the duration of the violation. We also find, however, that a downward adjustment of the forfeiture amount is appropriate in the instant case. The TOCSIA informational tariff filing requirement is relatively new and imposes, for the first time, an obligation on Telefonica Larga Distancia and other OSPs to make such filings with this Commission.

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[1] "Operator services" is defined as

> any interstate telecommunications service initiated from an aggregator location that includes, as a component, any automatic or live assistance to a consumer to arrange for billing or completion, or both, of an interstate telephone call through a method other than --
>
> (A) automatic completion with billing to the telephone from which the call originated; or
>
> (B) completion through an access code used by the consumer, with billing to an account previously established with the carrier by the consumer.

47 U.S.C. § 226(a)(7); 47 C.F.R. § 64.708(g).

[2] The procedures for filing informational tariffs with the Commission are set forth in Section 61.32 of the Commission's rules, 47 C.F.R. § 61.32. *See* Public Notice, 5 FCC Rcd 7444 (Com. Car. Bur. 1990) (Public Notice).

[3] 47 U.S.C. § 226(h)(3)(A).

[4] *Policies and Rules Concerning Operator Service Providers*, Order (Phase II), 6 FCC Rcd 2314 (Com. Car. Bur. 1991).

[5] A forfeiture for any continuing violation involving any single act or failure to act by a common carrier is limited to a maximum of $1,000,000.

[6] *Policy Statement, Standards for Assessing Forfeitures*, 6 FCC Rcd 4695 (1991), *recon. pending*.

[7] *Id.* at 4700.

Under these circumstances, we find that a downward adjustment of the forfeiture amount to $52,500 is appropriate.

7. Accordingly, IT IS ORDERED, pursuant to Section 503(b) of the Communications Act, 47 U.S.C. § 503(b), that Telefonica Larga Distancia de Puerto Rico is HEREBY NOTIFIED of an apparent liability for a forfeiture in the amount of fifty-two thousand five hundred dollars ($52,500) for willful and repeated violations of Section 226(h)(1)(A) of TOCSIA, 47 U.S.C. § 226(h)(1)(A), in the manner and on the dates described above. The amount specified was determined after consideration of the factors set forth in Section 503(b)(2) of the Communications Act of 1934, as amended.

8. IT IS FURTHER ORDERED, pursuant to Section 1.80(f)(3) of the Commission's rules, 47 C.F.R. § 1.80(f)(3), that Telefonica Larga Distancia de Puerto Rico shall, within thirty (30) days of release of this Notice, pay the full amount of the forfeiture or file a response showing why the forfeiture should not be imposed or why the proposed forfeiture should be reduced. Such a forfeiture amount shall be paid by check or money order drawn to the order of the Federal Communications Commission. The check or money order should be mailed to the Federal Communications Commission, Post Office Box 73482, Chicago, Illinois 60673-7482. The check or money order must identify the payer and reference File No. ENF-91-017.

9. IT IS FURTHER ORDERED that a copy of this Notice of Apparent Liability for Forfeiture shall be sent by certified mail, return receipt requested, to Telefonica Larga Distancia de Puerto Rico, c/o Covington & Burling, J. Clifford Frazier, 1201 Pennsylvania Avenue, N.W., Washington, D.C. 20044.

FEDERAL COMMUNICATIONS COMMISSION

Donna R. Searcy
Secretary

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

World Communications, Inc.
Saint Louis, Missouri

File No. ENF-91-018

Apparent Violations of
Telephone Operator Consumer
Services Improvement Act of 1990

NOTICE OF APPARENT LIABILITY FOR FORFEITURE

Adopted: November 8, 1991; Released: November 25, 1991

By the Commission:

1. By this Notice of Apparent Liability for Forfeiture, we initiate enforcement action against World Communications, Inc., a provider of operator services (OSP),[1] for apparent violations of the Telephone Operator Consumer Services Improvement Act of 1990, Pub. L. No. 101-435, 104 Stat. 986 (47 U.S.C. § 226) (TOCSIA).

2. TOCSIA was signed into law on October 17, 1990 and, among other things, required that each OSP file an informational tariff with the Commission not later than January 15, 1991,

> specifying rates, terms, and conditions, and including commissions, surcharges, any fees which are collected from consumers, and reasonable estimates of the amount of traffic priced at each rate, with respect to calls for which operator services are provided.

47 U.S.C. § 226(h)(1)(A).[2]

3. In addition to the tariff filing requirement, TOCSIA directs the Commission to monitor and report on OSP rates; determine the extent to which offerings made by OSPs improve operator services available to the public; report on operator service rates, incidence of complaints, and service offerings; consider the effect of commissions and various other costs of doing business on OSP rates; and generally monitor compliance with TOCSIA.[3] To fulfill a number of these statutory requirements, the Commission implemented policies and procedures requiring OSPs to file with the Commission, at specified times, a total of four monitoring reports setting forth: (1) compilations of rates, including sample charges; (2) the incidence of complaints for six specified categories relating to OSP operations; and (3) certain cost data.[4] The first of these monitoring reports, for the period January 1, 1991 through April 30, 1991, was due by June 21, 1991.

4. A review of the informational tariffs and monitoring reports received by the Commission for the January 15, 1991 and June 21, 1991 filing dates indicates that World Communications, Inc. filed the required monitoring report but has apparently failed to file the informational tariff required by Section 226(h)(1)(A) of TOCSIA in the manner set forth in the Public Notice.

5. Based on the foregoing, it appears that World Communications, Inc. has wilfully and repeatedly violated Section 226(h)(1)(A) of TOCSIA by failing to file the required informational tariff with the Commission by January 15, 1991. Under Section 503(b) of the Communications Act, the Commission may impose forfeitures against common carriers up to $100,000 for each violation or each day of a continuing violation in contravention of the Communications Act or rule, regulation or order of the Commission. *See* 47 U.S.C. § 503(b)(2)(B).[5] In the instant case, the apparent failure to file an informational tariff constitutes a continuing violation for each day beyond January 15, 1991 that World Communications, Inc. remains in noncompliance.

6. The Commission has adopted standards for assessing forfeitures in particular cases.[6] Pursuant to the *Policy Statement*, common carriers that are found to be in violation of operator service requirements are subject to a base forfeiture amount of $75,000. This base amount may be adjusted upward or downward depending on a number of factors.[7] In the instant case, the violation has continued for approximately ten months. Consistent with the *Policy Statement*, we are making an upward adjustment of the forfeiture amount to $82,500 given the duration of the violation. We also find, however, that a downward adjustment of the forfeiture amount is appropriate in the instant case. The TOCSIA informational tariff filing requirement is relatively new and imposes, for the first time, an obligation on World Communications, Inc. and other OSPs to make such filings with this Commission.

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[1] "Operator services" is defined as

> any interstate telecommunications service initiated from an aggregator location that includes, as a component, any automatic or live assistance to a consumer to arrange for billing or completion, or both, of an interstate telephone call through a method other than --
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> (A) automatic completion with billing to the telephone from which the call originated; or
>
> (B) completion through an access code used by the consumer, with billing to an account previously established with the carrier by the consumer.

47 U.S.C. § 226(a)(7); 47 C.F.R. § 64.708(g).

[2] The procedures for filing informational tariffs with the Commission are set forth in Section 61.32 of the Commission's rules, 47 C.F.R. § 61.32. *See* Public Notice, 5 FCC Rcd 7444 (Com. Car. Bur. 1990) (Public Notice).

[3] 47 U.S.C. § 226(h)(3)(A).

[4] *Policies and Rules Concerning Operator Service Providers*, Order (Phase II), 6 FCC Rcd 2314 (Com. Car. Bur. 1991).

[5] A forfeiture for any continuing violation involving any single act or failure to act by a common carrier is limited to a maximum of $1,000,000.

[6] *Policy Statement, Standards for Assessing Forfeitures*, 6 FCC Rcd 4695 (1991), *recon. pending*.

[7] *Id.* at 4700.

Under these circumstances, we find that a downward adjustment of the forfeiture amount to $52,500 is appropriate.

7. Accordingly, IT IS ORDERED, pursuant to Section 503(b) of the Communications Act, 47 U.S.C. § 503(b), that World Communications, Inc. is HEREBY NOTIFIED of an apparent liability for a forfeiture in the amount of fifty-two thousand five hundred dollars ($52,500) for willful and repeated violations of Section 226(h)(1)(A) of TOCSIA, 47 U.S.C. § 226(h)(1)(A), in the manner and on the dates described above. The amount specified was determined after consideration of the factors set forth in Section 503(b)(2) of the Communications Act of 1934, as amended.

8. IT IS FURTHER ORDERED, pursuant to Section 1.80(f)(3) of the Commission's rules, 47 C.F.R. § 1.80(f)(3), that World Communications, Inc. shall, within thirty (30) days of release of this Notice, pay the full amount of the forfeiture or file a response showing why the forfeiture should not be imposed or why the proposed forfeiture should be reduced. Such a forfeiture amount shall be paid by check or money order drawn to the order of the Federal Communications Commission. The check or money order should be mailed to the Federal Communications Commission, Post Office Box 73482, Chicago, Illinois 60673-7482. The check or money order must identify the payer and reference File No. ENF-91-018.

9. IT IS FURTHER ORDERED that a copy of this Notice of Apparent Liability for Forfeiture shall be sent by certified mail, return receipt requested, to World Communications, Inc., 1992 Innerbelt Business Center Drive, Saint Louis, Missouri 63114.

FEDERAL COMMUNICATIONS COMMISSION

Donna R. Searcy
Secretary

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 91-339

In the Matter of

Amendment of Section 73.202(b), RM-7857
Table of Allotments,
FM Broadcast Stations.
(Campbell, New York)

NOTICE OF PROPOSED RULE MAKING

Adopted: November 4, 1991; Released: November 25, 1991

Comment Date: January 16, 1992
Reply Comment Date: January 31, 1992

By the Assistant Chief, Allocations Branch:

1. The Commission has before it the petition for rule making filed by Markey Broadcasting Company ("petitioner") requesting the allotment of Channel 270A to Campbell, New York, as the community's first local FM service.[1] Petitioner states that it will apply for the channel, if allotted.

2. We believe the public interest would be served by proposing the allotment of Channel 270A to Campbell, New York, since it could provide the community with its first local FM transmission service. Channel 270A can be allotted to Campbell in compliance with the Commission's minimum distance separation requirements with a site restriction of 3.9 kilometers (2.4 miles) west to avoid short-spacings to Station WECQ-FM, Channel 269A, Geneva, New York, and Station WAVT-FM, Channel 270B, Pottsville, Pennsylvania.[2] Canadian concurrence in the allotment is required since Campbell is located within 320 kilometers (200 miles) of the U.S.-Canadian border.

3. Accordingly, we seek comments on the proposed amendment of the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, for the community listed below, to read as follows:

	Channel No.	
City	Present	Proposed
Campbell, New York	--	270A

4. The Commission's authority to institute rule making proceedings, showings required, cut-off procedures, and filing requirements are contained in the attached Appendix and are incorporated by reference herein. In particular, we note that a showing of continuing interest is required by paragraph 2 of the Appendix before a channel will be allotted.

5. Interested parties may file comments on or before **January 16, 1992,** and reply comments on or before **January 31, 1992,** and are advised to read the Appendix for the proper procedures. Comments should be filed with the Secretary, Federal Communications Commission, Washington, D.C. 20554. Additionally, a copy of such comments should be served on the petitioner, or its counsel or consultant, as follows:

Markey Broadcasting Company
c/o Matt Edwards
Box 1259
Elmira, New York 14902
(Consultant to petitioner)

6. The Commission has determined that the relevant provisions of the Regulatory Flexibility Act of 1980 do not apply to rule making proceedings to amend the FM Table of Allotments, Section 73.202(b) of the Commission's Rules. *See Certification That Sections 603 and 604 of the Regulatory Flexibility Act Do Not Apply to Rule Making to Amend Sections 73.202(b), 73.504 and 73.606(b) of the Commission's Rules*, 46 FR 11549, February 9, 1981.

7. For further information concerning this proceeding, contact Leslie K. Shapiro, Mass Media Bureau, (202) 634-6530. For purposes of this restricted notice and comment rule making proceeding, members of the public are advised that no *ex parte* presentations are permitted from the time the Commission adopts a Notice of Proposed Rule Making until the proceeding has been decided and such decision is no longer subject to reconsideration by the Commission or review by any court. An *ex parte* presentation is not prohibited if specifically requested by the Commission or staff for the clarification or adduction of evidence or resolution of issues in the proceeding. However, any new written information elicited from such a request or a summary of any new oral information shall be served by the person making the presentation upon the other parties to the proceeding unless the Commission specifically waives this service requirement. Any comment which has not been served on the petitioner constitutes an *ex parte* presentation and shall not be considered in the proceeding. Any reply comment which has not been served on the person(s) who filed the comment, to which the reply is directed, constitutes an *ex parte* presentation and shall not be considered in the proceeding.

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[1] Petitioner's request was signed by its technical consultant. We are unable to determine from the petition if petitioner's consultant is also a principal of the petitioner. Although a petitioner may seek assistance in the preparation of a pleading or petition for rule making, Section 1.52 of the Commission's Rules requires that the original of any document filed with the Commission be signed and verified by the commenting or petitioning party and his/her address stated, unless they are represented by counsel. Therefore, petitioner is requested to clarify this matter and comply with the requirements of Section 1.52 in submitting its comments. Failure to do so could result in dismissal of its petition.

[2] The coordinates for Channel 270A at Campbell are North Latitude 42-14-04 and West Longitude 77-14-42.

FEDERAL COMMUNICATIONS COMMISSION

Michael C. Ruger
Assistant Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

APPENDIX

1. Pursuant to authority found in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61 0.204(b) and 0.283 of the Commission's Rules, IT IS PROPOSED TO AMEND the FM Table of Allotments, Section 73.202(b) of the Commission's Rules and Regulations, as set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached.

2. *Showings Required.* Comments are invited on the proposal(s) discussed in the *Notice of Proposed Rule Making* to which this Appendix is attached. Proponent(s) will be expected to answer whatever questions are presented in initial comments. The proponent of a proposed allotment is also expected to file comments even if it only resubmits or incorporates by reference its former pleadings. It should also restate its present intention to apply for the channel if it is allotted and, if authorized, to build a station promptly. Failure to file may lead to denial of the request.

3. *Cut - off Procedures.* The following procedures will govern the consideration of filings in this proceeding.

(a) Counterproposals advanced in this proceeding itself will be considered if advanced in initial comments, so that parties may comment on them in reply comments. They will not be considered if advanced in reply comments. *(See* Section 1.420(d) of the Commission's Rules.)

(b) With respect to petitions for rule making which conflict with the proposal(s) in this *Notice,* they will be considered as comments in the proceeding, and Public Notice to this effect will be given as long as they are filed before the date for filing initial comments herein. If they are filed later than that, they will not be considered in connection with the decision in this docket.

(c) The filing of a counterproposal may lead the Commission to allot a different channel than was requested for any of the communities involved.

4. *Comments and Reply Comments; Service.* Pursuant to applicable procedures set out in Sections 1.415 and 1.420 of the Commission's Rules and Regulations, interested parties may file comments and reply comments on or before the dates set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached. All submissions by parties to this proceeding or by persons acting on behalf of such parties must be made in written comments, reply comments, or other appropriate pleadings. Comments shall be served on the petitioner by the person filing the comments. Reply comments shall be served on the person(s) who filed comments to which the reply is directed. Such comments and reply comments shall be accompanied by a certificate of service. *(See* Section 1.420(a), (b) and (c) of the Commission's Rules.)

5. *Number of Copies.* In accordance with the provisions of Section 1.420 of the Commission's Rules and Regulations, an original and four copies of all comments, reply comments, pleadings, briefs, or other documents shall be furnished the Commission.

6. *Public Inspection of Filings.* All filings made in this proceeding will be available for examination by interested parties during regular business hours in the Commission's Public Reference Room at its headquarters, 1919 M Street N.W., Washington, D.C.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 90-547

In the Matter of

Amendment of Section 73.202(b),	RM-7477
Table of Allotments,	RM-7683
FM Broadcast Stations.	
(Claude and Dimmitt, Texas)	

REPORT AND ORDER
(Proceeding Terminated)

Adopted: November 4, 1991; Released: November 25, 1991

By the Assistant Chief, Allocations Branch:

1. At the request of Lucille Ann Lacy ("petitioner"), permittee of Station KARX-FM, Channel 239A, Claude, Texas, the Commission has before it the *Notice of Proposed Rule Making*, 5 FCC Rcd 6729 (1990), proposing the substitution of Channel 239C3 for Channel 239A at Claude, Texas, and the modification of her construction permit for Station KARX-FM to specify operation on the higher powered channel. Petitioner filed initial, reply and supplemental comments as well as a counterproposal.[1] Petitioner's counterproposal requests the substitution of Channel 239C1 for Channel 239A at Claude, Texas, and modification of her construction permit accordingly. In addition, petitioner requests the substitution of Channel 263C3 for Channel 240C3 at Dimmitt, Texas, and the modification of the construction permit for Station KDIU-FM, Dimmitt, Texas, in order to accomplish the upgrade at Claude. The Commission subsequently issued an *Order to Show Cause*, 6 FCC Rcd 5539 (1991), to Collins Communications Company ("Collins"), permittee of Station KDIU-FM, Channel 240C3, directing the permittee to demonstrate why its construction permit should not be modified to specify operation on Channel 263C3 in lieu of Channel 240C3. In response to the *Order to Show Cause*, petitioner submitted a letter from Collins stating that Collins has no objection to the proposed substitution, especially in light of petitioner's willingness to reimburse Collins for reasonable expenses associated with Station KDIU-FM's channel change.

2. We believe the public interest would be served by substituting Channel 239C1 for Channel 239A at Claude, Texas, and by substituting Channel 263C3 for Channel 240C3 at Dimmitt, in order to provide Claude with a wide coverage area FM service. Channel 239C1 can be allotted to Claude in compliance with the Commission's minimum distance separation requirements with a site restriction of 17.0 kilometers (10.6 miles) southwest to accommodate petitioner's desired site. Channel 263C3 can be allotted for Channel 240C3 at Dimmitt, Texas, in compliance with the Commission's minimum distance separation requirements and can be used at the site specified in Station KDIU-FM's construction permit.[2] In accordance with Commission policy, petitioner will be required to reimburse Collins for the reasonable costs associated with the change in Station KDIU-FM's construction permit to specify operation on Channel 263C3.

3. Accordingly, pursuant to the authority contained in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61, 0.204(b) and 0.283 of the Commission's Rules, IT IS ORDERED, That effective **January 9, 1992,** the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, IS AMENDED, with respect to the community listed below, to read as follows:

City	Channel No.
Claude, Texas	239C1
Dimmitt, Texas	263C3

4. IT IS FURTHER ORDERED, pursuant to Section 316(a) of the Communications Act of 1934, as amended, that the construction permit of Lucille Ann Lacy for Station KARX-FM, Claude, Texas, IS MODIFIED to specify operation on Channel 239C1, in lieu of Channel 239A, subject to the following conditions:

(a) Within 90 days of the effective date of this *Order*, the permittee shall submit to the Commission a minor change application for a construction permit (Form 301).

(b) Upon grant of the construction permit, program tests may be conducted in accordance with Section 73.1620.

(c) Nothing contained herein shall be construed to authorize a change in transmitter location or to avoid the necessity of filing an environmental impact statement pursuant to Section 1.1301 of the Commission's Rules.

5. IT IS FURTHER ORDERED, That pursuant to Section 316(a) of the Communications Act of 1934, as amended, the construction permit of Collins Communications Company for Station KDIU-FM, Dimmitt, Texas, IS MODIFIED to specify operation on Channel 263C3 in lieu of Channel 240C3, subject to the following conditions:

(a) Nothing contained herein shall be construed as authorizing any change in Station KDIU-FM's construction permit, BPH-850617ML, except the channel as specified above. Any other changes, except those so specified under Section 73.1620 of the Rules, require prior authorization pursuant to an application for construction permit (FCC Form 301).

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[1] Public Notice of the counterproposal was given March 27, 1991, Report No. 1842.

[2] The coordinates for Channel 239C1 at Claude are North Latitude 35-03-40 and West Longitude 101-32-35. The coordinates for Channel 263C3 at Dimmitt are North Latitude 34-35-11 and West Longitude 102-18-35.

(b) Program tests may be conducted in accordance with the provisions of Section 73.1620 of the Rules, PROVIDED the transmission facilities comply in all respects with construction permit BPH-850617ML, except for the channel as specified above and a license application (FCC Form 302) is filed within 10 days of commencement of program tests.

6. Pursuant to Commission Rule Section 1.1104(1)(k) and (2)(k), any party seeking a change of community of license of an FM or television allotment or an upgrade of an existing FM allotment, if the request is granted, must submit a rule making fee when filing its application to implement the change in community of license and/or upgrade. As a result of this proceeding, Lucille Ann Lacy, permittee of Station KARX-FM, is required to submit a rule making fee in addition to the fee required for the applications to effect the change in community and/or upgrade.

7. IT IS FURTHER ORDERED, That the Secretary shall send a copy of this *Report and Order* by Certified Mail, Return Receipt Requested, to the permittee of Station KDIU-FM, as follows: Collins Communications Company, P.O. Box 608, Dimmitt, Texas 79077.

8. IT IS FURTHER ORDERED, That the proposal of Lucille Ann Lacy to substitute Channel 239C3 for Channel 239A at Claude, Texas (RM-7477), IS DISMISSED.

9. IT IS FURTHER ORDERED, That this proceeding IS TERMINATED.

10. For further information concerning this proceeding, contact Pamela Blumenthal, Mass Media Bureau, (202) 634-6530.

FEDERAL COMMUNICATIONS COMMISSION

Michael C. Ruger
Assistant Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 91-340

In the Matter of

Amendment of Section 73.202(b), RM-7851
Table of Allotments,
FM Broadcast Stations.
(Harbeck-Fruitdale, Oregon)

NOTICE OF PROPOSED RULE MAKING

Adopted: November 7, 1991; Released: November 25, 1991

Comment Date: January 16, 1992
Reply Comment Date: January 31, 1992

By the Assistant Chief, Allocations Branch:

1. The Commission has before it the petition for rule making filed by Grants Pass Broadcasting Corporation ("petitioner") requesting the substitution of Channel 252C2 for Channel 252A at Harbeck-Fruitdale, Oregon, and the modification of Station KAJO-FM's construction permit to specify operation on the higher class channel. Petitioner states that it will apply for the channel, if allotted.

2. We believe the public interest would be served by proposing the substitution of Channel 252C2 for Channel 252A at Harbeck-Fruitdale, since it could provide the community with a wide coverage area FM service. Channel 252C2 can be allotted to Harbeck-Fruitdale in compliance with the Commission's minimum distance separation requirements at the transmitter site specified in the station's construction permit.[1] We note that the proposed allotment at Harbeck-Fruitdale is short-spaced to the present operation of Station KYTT-FM on Channel 252A at Coos Bay, Oregon. However, Station KYTT-FM's license has been modified to specify Channel 254C2. *See* BC Docket 81-155, 47 FR 56356, December 16, 1982. A copy of this *Notice of Proposed Rule Making* will be served on Mustard Seed Broadcasters, licensee of Station KYTT-FM.

3. As requested, we also propose to modify Station KAJO-FM's construction permit to specify operation on Channel 252C2. In accordance with Section 1.420(g) of the Commission's Rules, we will not accept competing expressions of interest in use of the channel at Harbeck-Fruitdale or require the petitioner to demonstrate the availability of an additional equivalent class channel for use by such parties.

4. Accordingly, we seek comments on the proposed amendment of the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, for the community listed below, to read as follows:

	Channel No.	
City	Present	Proposed
Harbeck-Fruitdale, Oregon	252A	252C2

5. The Commission's authority to institute rule making proceedings, showings required, cut-off procedures, and filing requirements are contained in the attached Appendix and are incorporated by reference herein. In particular, we note that a showing of continuing interest is required by paragraph 2 of the Appendix before a channel will be allotted.

6. Interested parties may file comments on or before **January 16, 1992,** and reply comments on or before **January 31, 1992,** and are advised to read the Appendix for the proper procedures. Comments should be filed with the Secretary, Federal Communications Commission, Washington, D.C. 20554. Additionally, a copy of such comments should be served on the petitioner, or its counsel or consultant, as follows:

Carl W. Wilson
Grants Pass Broadcasting Corporation
P.O. Box 230
Grants Pass, Oregon 97526
(Petitioner)

7. IT IS ORDERED, That the Secretary SHALL SEND a copy of this *Notice of Proposed Rule Making,* BY CERTIFIED MAIL, RETURN RECEIPT REQUESTED, to the licensee of Station KYTT-FM, as follows: Mustard Seed Broadcasters, 455 Broadway, Coos Bay, Oregon 97420.

8. The Commission has determined that the relevant provisions of the Regulatory Flexibility Act of 1980 do not apply to rule making proceedings to amend the FM Table of Allotments, Section 73.202(b) of the Commission's Rules. *See Certification That Sections 603 and 604 of the Regulatory Flexibility Act Do Not Apply to Rule Making to Amend Sections 73.202(b), 73.504 and 73.606(b) of the Commission's Rules,* 46 FR 11549, February 9, 1981.

9. For further information concerning this proceeding, contact Leslie K. Shapiro, Mass Media Bureau, (202) 634-6530. For purposes of this restricted notice and comment rule making proceeding, members of the public are advised that no *ex parte* presentations are permitted from the time the Commission adopts a Notice of Proposed Rule Making until the proceeding has been decided and such decision is no longer subject to reconsideration by the Commission or review by any court. An *ex parte* presentation is not prohibited if specifically requested by the Commission or staff for the clarification or adduction of evidence or resolution of issues in the proceeding. However, any new written information elicited from such

[1] The coordinates for Channel 252C2 at Harbeck-Fruitdale are North Latitude 42-22-56 and West Longitude 123-16-29.

a request or a summary of any new oral information shall be served by the person making the presentation upon the other parties to the proceeding unless the Commission specifically waives this service requirement. Any comment which has not been served on the petitioner constitutes an *ex parte* presentation and shall not be considered in the proceeding. Any reply comment which has not been served on the person(s) who filed the comment, to which the reply is directed, constitutes an *ex parte* presentation and shall not be considered in the proceeding.

FEDERAL COMMUNICATIONS COMMISSION

Michael C. Ruger
Assistant Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

APPENDIX

1. Pursuant to authority found in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61 0.204(b) and 0.283 of the Commission's Rules, IT IS PROPOSED TO AMEND the FM Table of Allotments, Section 73.202(b) of the Commission's Rules and Regulations, as set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached.

2. *Showings Required.* Comments are invited on the proposal(s) discussed in the *Notice of Proposed Rule Making* to which this Appendix is attached. Proponent(s) will be expected to answer whatever questions are presented in initial comments. The proponent of a proposed allotment is also expected to file comments even if it only resubmits or incorporates by reference its former pleadings. It should also restate its present intention to apply for the channel if it is allotted and, if authorized, to build a station promptly. Failure to file may lead to denial of the request.

3. *Cut - off Procedures.* The following procedures will govern the consideration of filings in this proceeding.

(a) Counterproposals advanced in this proceeding itself will be considered if advanced in initial comments, so that parties may comment on them in reply comments. They will not be considered if advanced in reply comments. *(See* Section 1.420(d) of the Commission's Rules.)

(b) With respect to petitions for rule making which conflict with the proposal(s) in this *Notice*, they will be considered as comments in the proceeding, and Public Notice to this effect will be given as long as they are filed before the date for filing initial comments herein. If they are filed later than that, they will not be considered in connection with the decision in this docket.

(c) The filing of a counterproposal may lead the Commission to allot a different channel than was requested for any of the communities involved.

4. *Comments and Reply Comments; Service.* Pursuant to applicable procedures set out in Sections 1.415 and 1.420 of the Commission's Rules and Regulations, interested parties may file comments and reply comments on or before the dates set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached. All submissions by parties to this proceeding or by persons acting on behalf of such parties must be made in written comments, reply comments, or other appropriate pleadings. Comments shall be served on the petitioner by the person filing the comments. Reply comments shall be served on the person(s) who filed comments to which the reply is directed. Such comments and reply comments shall be accompanied by a certificate of service. *(See* Section 1.420(a), (b) and (c) of the Commission's Rules.)

5. *Number of Copies.* In accordance with the provisions of Section 1.420 of the Commission's Rules and Regulations, an original and four copies of all comments, reply comments, pleadings, briefs, or other documents shall be furnished the Commission.

6. *Public Inspection of Filings.* All filings made in this proceeding will be available for examination by interested parties during regular business hours in the Commission's Public Reference Room at its headquarters, 1919 M Street N.W., Washington, D.C.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 91-249

In the Matter of

Amendment of Section 73.202(b),	RM-7777
Table of Allotments,	
FM Broadcast Stations.	
(Danville, Arkansas)	

REPORT AND ORDER
(Proceeding Terminated)

Adopted: November 7, 1991; Released: November 25, 1991

By the Assistant Chief, Allocations Branch:

1. Before the Commission for consideration is the *Notice of Proposed Rule Making*, 6 FCC Rcd 5073 (1991), issued in response to a petition filed on behalf of Susan Lynn Adair ("petitioner"), proposing the allotment of Channel 288A to Danville, Arkansas, as that community's first local aural transmission service. Petitioner filed comments in support of the proposal reiterating her intention to apply for Channel 288A if allotted to Danville. No other comments were received.

2. We believe the public interest would be served by allotting Channel 288A to Danville since it could provide a first local aural transmission service to the community. As indicated in the *Notice*, Channel 288A can be allotted to Danville, Arkansas, in conformity with the minimum distance separation requirements of the Commission's Rules, without the imposition of a site restriction.[1]

3. Accordingly, pursuant to the authority contained in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61, 0.204(b) and 0.283 of the Commission's Rules, IT IS ORDERED, That effective **January 9, 1992,** the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, IS AMENDED to include the community listed below, as follows:

City	Channel No.
Danville, Arkansas	288A

4. IT IS FURTHER ORDERED, That this proceeding IS TERMINATED.

5. The window period for filing applications on Channel 288A at Danville, Arkansas, will open on **January 10, 1992,** and close on **February 10, 1992.**

6. For further information concerning the above, contact Nancy Joyner, Mass Media Bureau, (202) 634-6530. Questions related to the window application filing process should be addressed to the Audio Services Division, FM Branch, Mass Media Bureau, (202) 632-0394.

FEDERAL COMMUNICATIONS COMMISSION

Michael C. Ruger
Assistant Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

[1] Coordinates used for Channel 288A at Danville are 35-03-18 and 93-23-36.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 88-512

In the Matter of

Amendment of Section 73.202(b),	RM-6418
Table of Allotments,	RM-6507
FM Broadcast Stations.	RM-7168
(Bonita Springs, Cape Coral, Tampa, and Fort Myers Beach, Florida)[1]	

REPORT AND ORDER
(Proceeding Terminated)

Adopted: November 12, 1991; Released: November 25, 1991

By the Chief, Allocations Branch:

1. The Commission has before it the *Notice of Proposed Rule Making* in this proceeding, 3 FCC Rcd 6314 (1988), setting forth two competing proposals. The first proposal was by Jacor Communications, Inc., proposing the allotment of Channel 283A to Bonita Springs, Florida, as a second local FM service. The second proposal was by Radio Cape Coral, Inc., licensee of Station WAKS (formerly WRCC), Channel 279C2, Cape Coral, Florida, proposing the substitution of Channel 280C1 for Channel 279C2 at Cape Coral, and modification of its license to specify operation on Channel 280C1. In response to the *Notice*, we received counterproposals from Carl Haefling and the Chapman S. Root Revocable Trust. Jacor Communications, Inc., Bonita Springs Broadcasters, Big Bonita Broadcasting Company, Harbor Broadcasting Company, L.P., Radio Cape Coral, Inc., and Hugh Holder filed comments. Harbor Broadcasting Company, L.P., Chapman S. Root Revocable Trust, Bonita Springs Broadcasters, and Radio Cape Coral, Inc. filed reply comments. Edens Broadcasting, Inc. filed comments in response to the Carl Haefling counterproposal. For the reasons discussed below, we are substituting Channel 280C1 for Channel 279C2 at Cape Coral, Florida, and are also modifying the license of Station WAKS, Cape Coral, Florida, to specify operation on Channel 280C1.

BACKGROUND

2. This proceeding began with the filing of two separate petitions for rule making involving the communities of Bonita Springs and Cape Coral, Florida. In response to the *Notice* setting forth these conflicting proposals, we received two counterproposals. The first counterproposal was filed by Carl Haefling proposing the allotment of Channel 285A to Fort Myers Beach, Florida as a second local FM service.[2] This proposal conflicts with the proposed Channel 283A allotment at Bonita Springs.[3] The second counterproposal was filed by the Chapman S. Root Revocable Trust ("Root"), licensee of Station WEZY-FM, Channel 231C1, Lakeland, Florida, proposing the substitution of Channel 283C for Channel 284C at Tampa, Florida, and modification of the license of Station WRBQ-FM, Tampa, to specify operation on Channel 283C. A Channel 283C allotment at Tampa would eliminate an IF short-spacing with Station WEZY-FM and permit grant of an application by Root to maintain full Class C facilities at Station WEZY-FM (File No. BPH-860421IC). This substitution would also permit Station WRBQ-FM, Channel 284C, Tampa, Florida, to maintain full Class C status.[4] The Channel 283C substitution at Tampa conflicts with the proposal to allot Channel 283A to Bonita Springs.

DISCUSSION

3. At the outset, it is necessary to dismiss the counterproposal advanced by Root. A Channel 283C allotment at Tampa would be short-spaced to co-channel Station WFYV, Atlantic Beach, Florida (278 kilometers instead of the 290 kilometers required by Section 73.207(b)(1) of the Rules). In regard to this short-spacing, Root contends that there would not be any interference because of the "existing use of a directionalized antenna" by Station WFYV. This argument does not justify the proposed short-spacing. Pursuant to Section 73.316 of the Rules, Station WFYV formerly operated with a directional antenna to avoid overlap of the 60 dBu contours of Station WFYV and commonly owned Station WJYO, Mount Dora, Florida, in contravention of Section 73.3555 of the Rules. Section 73.316 specifically states that a station may not operate with a directional antenna in order to meet the minimum spacing requirements of the Rules. A station operating pursuant to Section 73.316 of the Rules does not forfeit its right to interference protection based upon the minimum spacing requirements set forth in Section 73.207(b)(1) or 73.213(c)(1) of the Rules.[5]

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[1] The communities of Tampa and Fort Myers Beach, Florida, have been added to the caption.

[2] Public Notice was given on November 15, 1989 (Report No. 1810).

[3] Jacor Communications, Inc., the original proponent for Channel 283A at Bonita Springs, withdrew its interest in applying for this allotment. However, Hugh Holder, Bonita Springs Broadcasters, and Big Bonita Broadcasting Co. have filed timely expressions of interest in the proposed Bonita Springs allotment. Therefore, the proposed Bonita Springs allotment will continue to be considered in this proceeding.

[4] Edens Broadcasting, Inc., licensee of Station WRBQ-FM, would amend its pending application on Channel 284C specifying full Class C facilities (File No. BPH-830714AT) to specify Channel 283C. In a related context, on April 9, 1990, the Commission denied review of the Review Board decision denying this application. 5 FCC Rcd 2576 (1990), *recon denied*, 6 FCC Rcd 4327 (1991).

[5] On March 2, 1989, we granted an application by Station WFYV to return to nondirectional operation (File No. BPH-890112IA).

4. On September 25, 1990, Carl Haefling requested that his counterproposal for a Channel 285A allotment at Fort Myers Beach, Florida, be withdrawn.[6] Accordingly, we will dismiss this counterproposal without further consideration.[7]

5. There are now two pending proposals in this proceeding. These are a new allotment at Bonita Springs, Florida (Channel 283A), and the upgrade at Station WAKS, Cape Coral, Florida, to specify operation on Channel 280C1. Conflicting proposals are comparatively considered under the guidelines set forth in *Revision of FM Assignment Policies and Procedures*, 90 FCC 2d 88 (1982). In comparing conflicting proposals, the priorities are as follows:

1) First fulltime aural service

2) Second fulltime aural service

3) First local service

4) Other public interest matters

(Co-equal weight is given to priorities (2) and (3).)

Under normal circumstances, we will favor a new service over an upgrading of an existing service. *See Benton, Arkansas et al.*, 2 FCC Rcd 1963 (1987) and 3 FCC Rcd 4840 (1988). However, in the present situation, we will grant the Cape Coral upgrade because it will provide a second fulltime aural service. In its comments, Harbor Broadcasting Company, L.P., contends that the proposed Station WAKS upgrade would provide a second fulltime aural service to 1,290 persons in an area of 335 square kilometers. We have undertaken our own engineering analysis of the proposed upgrade at Cape Coral to determine whether this upgrade would, in fact, provide a second fulltime service to existing "gray" area.[8] We have determined that the proposed upgrade would provide a second fulltime aural service to approximately 8,165 persons, and, as such, this upgrade would be preferred under priority (2) over the proposed new allotment at Bonita Springs which would be considered under priority (4).[9] We have based this determination on the fact that a portion of the proposed Station WAKS gain area receives service from only one existing fulltime station, Station WINK-FM, Fort Myers, Florida. This gray area is delineated by the 1 mV/m service contours of Station WCAC-FM, Sebring, Florida, Station WKGR-FM, Fort Pierce, Florida, Station WHEW-FM, Fort Myers, Florida, Station WHVE-FM, Sarasota, Florida, and the would-be 1 mV/m service contour of Station WAKS as upgraded. With respect to the present gray area, we note that the nighttime service contour of the nearest AM station, Station WJCM, Sebring, Florida, does not extend to the gray area.[10] After determining that gray area exists, we then calculated the population within this area. Our calculation is based on the fact that the gray area encompasses 10% of the area of Glade County, and 25% of the area of Highland County. We then deducted the populations of communities that are outside of gray area, Avon Park, Moore Haven, and Sebring, Florida. Assuming an equal distribution of the population within the gray area, we then multiplied the remaining populations of the counties by the 10 and 25 percentages.

6. We believe that the public interest would be served by the substitution of Channel 280C1 for Channel 279C2 at Cape Coral, Florida, and modification of the license of Station WAKS to specify operation on Channel 280C1 because it would enable Station WAKS to expand its service area and provide service to 8,165 persons now receiving only one fulltime service.

7. Accordingly, pursuant to the authority found in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61, 0.204(b) and 0.283 of the Commission's Rules, IT IS ORDERED, That effective **January 9, 1992,** the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, IS AMENDED for the community listed below, as follows:

Community	Channel No.
Cape Coral, Florida	280C1

8. IT IS FURTHER ORDERED, That pursuant to Section 316(a) of the Communications Act of 1934, as amended, the license of Station WAKS, Cape Coral, Florida, IS MODIFIED to specify operation on Channel 280C1, in lieu of Channel 279C2, subject to the following conditions:

(a) Within 90 days of the effective date of this *Order*, the licensee shall submit to the Commission a minor change application for a construction permit (Form 301), specifying the new facility;

(b) Upon grant of the construction permit, program tests may be conducted in accordance with Section 73.1620; and

(c) Nothing contained herein shall be construed to authorize a change in transmitter location or to avoid the necessity of filing an environmental impact statement pursuant to Section 1.1301 of the Commission's Rules.

9. IT IS FURTHER ORDERED, That the petition for rule making filed by Jacor Communications, Inc. (RM-6418), proposing the allotment of Channel 283A at Bonita Springs, Florida, IS DENIED.

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[6] Inasmuch as this request was filed prior to the October 4, 1990, effective date of the Commission action in *Amendment of Section 1.420 and Section 73.3584 of the Commission's Rules Concerning Abuses of the Commission's Processes*, 5 FCC Rcd 3911 (1990), it was not necessary for Carl Haefling to include an affidavit that he received no consideration for the withdrawal.

[7] As a result of this dismissal, supplemental comments in reply to the counterproposal of Carl Haefling will not be considered. Similarly, supplemental reply comments filed by Carl Haefling will also not be considered.

[8] While Bonita Springs Broadcasters contends in its reply comments that Harbor's engineering study does not follow the methodology set forth in *Roanoke Rapids, North Carolina*, 9 FCC 2d 672 (1967), and *Anamosa and Iowa City, Iowa*, 46 FCC 2d 520 (1974), we need not reach this issue because we are relying on our own engineering analysis.

[9] The reference coordinates for the Channel 280C1 allotment at Cape Coral, Florida, are 26-47-43 and 81-48-04. This site is 29.7 kilometers (18.5 miles) northeast of Cape Coral.

[10] During nighttime hours, service is defined as the area within a contour considering the root-sum-square (RSS) of the interference of other AM stations.

10. IT IS FURTHER ORDERED, That the counter-proposal filed by Chapman S. Root Revocable Trust, proposing the substitution of Channel 283C for Channel 284C at Tampa, Florida, IS DISMISSED.

11. IT IS FURTHER ORDERED, That the counter-proposal filed by Carl Haefling (RM-7168) proposing the allotment of Channel 285A at Fort Myers Beach, Florida, IS DISMISSED.

12. IT IS FURTHER ORDERED, That this proceeding IS TERMINATED.

13. For further information concerning this proceeding, contact Robert Hayne, Mass Media Bureau, (202) 634-6530.

FEDERAL COMMUNICATIONS COMMISSION

Andrew J. Rhodes
Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 90-322

In the Matter of

Amendment of Section 73.606(b),	RM-7183
Table of Allotments,	RM-7517
Television Broadcast	
Stations. (Wilmington,	
Burgaw, Hamlet,	
Rockingham, and	
Laurel Hill, North Carolina;	
Norfolk-Portsmouth-Newport	
News-Hampton, Virginia)[1]	

REPORT AND ORDER
(Proceeding Terminated)

Adopted: November 13, 1991; Released: November 25, 1991

By the Chief, Allocations Branch:

1. The Commission considers herein a *Notice of Proposed Rule Making and Order to Show Cause*, 5 FCC Rcd 4004 (1990) (*"Notice"*), in response to a petition (RM-7183) filed on behalf of Wilmington Minority Broadcasters ("WMB"), proposing that VHF television Channel 10 be allotted to Wilmington, North Carolina to provide that community with its fourth local commercial television service. Comments were filed by WMB; WAVY Television, Inc. ("WAVY"), licensee of Station WAVY-TV, VHF Channel 10+, Norfolk-Portsmouth-Newport News-Hampton, Virginia; Wilmington Telecasters Inc. ("WTI"), licensee of Station WJKA(TV), UHF Channel 26, Wilmington, North Carolina; Local Television Associates, Inc. ("LTA"), licensee of Station WFXI(TV), VHF Channel 8, Morehead City, North Carolina; New Horizons Communications and Edward Jay Bolton ("New Horizons"), which filed a counterproposal (RM-7517);[2] and by the North Carolina Coastal Federation ("Federation"), whose timely-filed letter comments were made a part of the record in this proceeding. Reply comments regarding WMB's proposal were filed by WMB and WTI. Replies to the counterproposal were filed by WMB, LTA, WAVY, and WTI. [3]

3. BACKGROUND

2. In the *Notice*, the Commission proposed the allotment of VHF Channel 10+ to Wilmington as its fourth local commercial television service. To accommodate this allotment, the *Notice* proposed to change the offset designation from Channel 10+ to Channel 10- for Station WAVY in the hyphenated community of Norfolk-Portsmouth-Newport News-Hampton, Virginia.[4] The *Notice* also indicated that petitioner WMB agreed to reimburse Station WAVY for reasonable costs involved in changing its channel offset and contained an order to show cause why WAVY's channel offset should not be changed to Channel 10-.

3. We also noted in the *Notice* that Wilmington is located in southeastern North Carolina along the coastline of the Atlantic Ocean, and that in order to comply with the Commission's minimum distance separation requirements, the allotment of Channel 10+ would require a severe site restriction of 50.1 kilometers (31.1 miles) northeast of Wilmington. Accordingly, we found that to provide the entirety of Wilmington with a city-grade signal, the station's operation would need to be circumscribed in the following manner. The transmitter site would have to be located in a small area along the environmentally sensitive coastline of the Atlantic Ocean and the station would be required to operate at maximum power with great antenna height of more than 300 meters (approximately 1000 feet) above average terrain. In view of these limiting factors, we requested that WMB provide in its comments a showing that a site can be utilized that meets potential environmental and Federal Aviation Administration ("FAA") concerns.

COMMENTS

4. In response to the *Notice*, New Horizons filed a counterproposal requesting that Burgaw, North Carolina be allotted Channel 10 to provide that community's first local television service, and that Wilmington be allotted instead UHF Channel 59. To accommodate the allotment of Channel 59 to Wilmington, New Horizons proposes deletion of Channel 59 at Laurel Hill, North Carolina. New Horizons also proposes that the community of Hamlet, North Carolina be allotted UHF Channel 68, as Hamlet's first local television service. To accommodate that allotment, New Horizons proposes that the noncommercial educational allotment at Rockingham, North Carolina be changed from UHF Channel *53 to UHF Channel *52.

5. WMB filed comments expressing its continuing interest in the allotment of Channel 10 to Wilmington, and states that it will expeditiously construct a station if the allotment is made. WMB does not respond, however, to the request made in the *Notice* that a showing be made

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[1] The communities of Burgaw, Hamlet, Rockingham, and Laurel Hill, North Carolina have been added to the caption.

[2] Notice of New Horizons' counterproposal was given by *Public Notice*, Report No. 1827, released October 12, 1990.

[3] WMB filed a motion for extension of time to file reply comments. WTI opposed the motion and WMB filed a reply. Good cause not having been shown, we denied WMB's motion. 5 FCC Rcd 5467 (1990).

[4] A television station may be required to operate with or without a channel offset. A station operating with a "plus" or "negative" offset has a carrier frequency 10 kHz above or below the nominal carrier frequency for a given channel. Two co-channel television stations whose transmitter sites are separated by a distance at or near the minimum distance required by our Rules (but greater than the minimum) require different channel offset designations to minimize the interference potential between the two stations.

that the area of the proposed site located on the Atlantic Ocean coastline can be utilized while meeting concerns of the environment and those regarding the air hazard potential posed by the necessarily tall antenna tower. In replying in a separate pleading to New Horizons' counterproposal, WMB submits that the proposal to allot Channel 68 to Hamlet is unrelated to its own proposal for a Channel 10 allotment to Wilmington, and that it has no intention of filing for Channel 59 in Wilmington as proposed by New Horizons. Accordingly, WMB urges that New Horizons' two proposals be deleted from the proceeding, because the proposal to allot Channel 59 to Wilmington "is in no way technically related" to WMB's Channel 10 proposal. WMB further argues that because the same transmitter site is proposed for Wilmington that is proposed by New Horizons for Burgaw (with identical coordinates), there can be no "environmental problem for one and not the other."[5]

6. The Federation,[6] however, notes that it "should be extremely difficult to obtain local, state, and federal permits to construct a tower" in the area in which a transmitter site could be located. That area has been designated, states the Federation, as "Outstanding Resource Waters by the NC Environmental Management Commission, . . Primary Nursery Area by the NC Marine Fisheries Commission and. . 404 Wetlands by the U.S. Environmental Protection Agency." Furthermore, apparently contemplating that guy wires from the tower would extend into adjacent navigable waters, the Federation urges that no tower or support wires should be allowed in those waters because they are heavily used for navigation by commercial and recreational boat traffic. The Federation also notes the possible hazard to aircraft posed by such a tall tower, particularly with the Camp Lejeune Marine Base only "a few miles from this zone [with its] heavily military air traffic." Finally, the Federation intimates that construction of a tower would be prohibited because it allegedly would not be consistent with the land use plan of the governing county. It argues that *"(a)ll state and federal agencies are prohibited* by state and federal law from issuing permits, certifications or authorizations for development (including TV towers) that is inconsistent" (emphasis in original) with the county land use plan required by the North Carolina Coastal Area Management Act ("CAMA").

7. LTA, in its comments, opposes the Wilmington allotment because, it contends, a transmitter site cannot be located in the extremely limited permissible area for many of the same reasons raised by the Federation. LTA notes further that "it is not clear that the FAA would permit construction of a television tower over 1000 feet in height, " particularly because "the maximum distance any proposed tower can be moved within the permissible area is about 8000 feet [one and one-half miles] from northwest to southwest." LTA's attachments include an engineering report that asserts that many acres of the dry land available for a site would be taken up by the tower and its long guy wires and their substantial supporting anchors and piers. These would be required, asserts LTA, for such a tower to withstand the very high winds experienced in the area. LTA's attachments also include detailed maps of the area in question and many pages of stringent CAMA guidelines for the granting of permits for construction in the environmentally sensitive coastline area. As to New Horizons' counterproposal, LTA notes, as does WMB, that New Horizons fails "to demonstrate that either FAA or local zoning and environmental approval is likely--much less assured."

8. In its comments, WTI "seriously doubt[s] that the petitioner will be able to locate a suitable site" within the limited area available. WTI notes that the only area in which an antenna tower can be located has been classified as environmentally sensitive wetlands by North Carolina state authorities and, as such, development in the area is severely restricted, including limitations on dredging and filling. WTI, in regard to these and other environmental matters, incorporates by reference the detailed concerns of the Federation. Because WTI considers the finding of a suitable site not likely, it urges that WMB be required to reveal precisely the location of the site, to demonstrate that it is indeed available, and that WMB can meet all environmental and safety concerns. Regarding New Horizons' counterproposal, WTI argues that because there is no mutual exclusivity with the proposed allotment of Channel 10 to Wilmington or to Burgaw, the proposed allotments of Channel 59 to Wilmington (and its required deletion from Laurel Hill) and Channel 68 to Hamlet (and its required change in the non-commercial allotment at Rockingham) cannot be properly classified as counterproposals. WTI states finally that we should deny the proposal for Burgaw since "from the standpoint of environmental assessment, nothing is different" from the antenna tower proposed by New Horizons except its lowered height.

9. WAVY, in its comments, notes WMB's commitment to reimburse all reasonable costs of WAVY-TV in changing its channel offset. Nonetheless, WAVY contends that the proposed allotment would create harmful co-channel interference to its station. WAVY attaches an engineering statement that purports to show that new interference would be received by a population in excess of 100,000, representing "approximately 7%" of the population within its Grade B contour. The engineering statement notes that the only available area for a site is "approximately 4.0 square kilometer[s]." WAVY urges the Commission not to proceed with the Wilmington allotment "without strong evidence of available, suitable sites and absolute commitment of any interested party to obtain and utilize such sites." As to the counterproposal for Burgaw, WAVY calls for denial on the same grounds that it advanced regarding the Wilmington proposal, contending that "interference will still be substantial ... [and that]... reduction in height [of the transmitting antenna tower for Burgaw] is of no significance."

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[5] WMB further argues that a comparison of the population of Wilmington, cited as exceeding 44,000 persons, with that of Burgaw (1586 persons) warrants the allotment of Channel 10 to Wilmington.

[6] The North Carolina Coastal Federation does not identify the nature of its organization but its name and its comments suggest that it is primarily concerned with the preservation of the natural environment along the North Carolina coast.

DISCUSSION

10. After carefully reviewing the record in this proceeding, we will deny WMB's rule making petition. The *Notice* posed a central question: was a suitable transmitter site available that comported with the Commission's rules, concerns for the environment, and FAA concerns? However, WMB has made no attempt to respond to our request for a showing that a site within the small triangular area can be utilized while meeting concerns that such a site would not have harmful environmental consequences. WMB also does not address potential air hazard concerns of the FAA posed by the necessarily tall tower. Generally, at the rule making stage we are not concerned with the availability or suitability of a given site. Rather, we are concerned with whether a theoretical site exists that would comply with all of our engineering requirements. *See Creswell, Oregon*, 4 FCC Rcd 7040 (1989). However, where the record gives reason to question whether any theoretical site exists despite apparent compliance with the Commission's minimum spacing and principal city coverage rules, the Commission may require at the allotment stage detailed showings regarding the availability of a suitable site. *See Key West, Florida*, 3 FCC Rcd 6423 (1988). Here, we have serious doubts in this regard despite the existence of a site that meets our spacing and coverage rules. It is therefore appropriate for the commenters to address the question of site suitability. Overwhelmingly, they all assert that the proposed transmitter site is unavailable because such site would have serious, unresolvable consequences for the environment and would require an antenna tower with an air hazard potential unacceptable to the FAA. Therefore, in addition to the failure of WMB to respond to our request for a showing as to site suitability, we will also deny WMB's petition because the comments give us strong reasons to believe that a transmitter site within the limited available area cannot be utilized. We therefore conclude that a suitable transmitter site for a Channel 10 allotment to Wilmington does not exist.

11. We also reject the Burgaw counterproposal by reason of site unavailability. Burgaw specifies the identical site located in the same small, ecologically sensitive Atlantic Coastal area we reject for WMB. This alone disqualifies it from use for a transmitter site, despite the fact that the antenna tower required for Burgaw, of significantly lower height than the one required for Wilmington, may not pose as much of an air hazard. Therefore, we will deny New Horizons' counterproposal for Burgaw, which obviates the proposed deletion of the Channel 59 allotment at Laurel Hill and the proposed allotment of Channel 59 to Wilmington. With respect to New Horizons' other proposal to allot Channel 68 to Hamlet, we will dismiss it. Such proposal was inappropriately filed in this proceeding; it is not mutually exclusive with an allotment to Wilmington or any other related community. New Horizons, of course, is free to submit a separate petition proposing an allotment to Hamlet,[7] or any other non-mutually exclusive allotment to Wilmington.

12. Accordingly, pursuant to authority contained in Sections 4(i), 5(c)(1), 303(g) and (r), and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61, 204(b), and 0.284 of the Commission's Rules, IT IS ORDERED That the petition filed by Wilmington Minority Broadcasters (RM-7183) IS DENIED.

13. IT IS FURTHER ORDERED That the counterproposal filed by New Horizons Communications and Edward Jay Bolton (RM-7517) is DENIED with respect to Burgaw and otherwise DISMISSED.

14. IT IS FURTHER ORDERED That this proceeding IS TERMINATED.

15. For further information concerning the above, contact J. Bertron Withers, Jr., Mass Media Bureau, (202) 634-6530.

FEDERAL COMMUNICATIONS COMMISSION

Andrew J. Rhodes
Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

[7] In view of our dismissal of the proposed Channel 68 allotment to Hamlet, no channel change is necessary for the noncommercial allotment at Rockingham.

Before the
Federal Communications Commission
Washington, D.C. 20554

PUBLIC NOTICE

Released: November 26, 1991

ALLTEL SERVICE CORPORATION FILES PETITION FOR WAIVER OF THE COMMISSION'S PART 36 RULES REGARDING THE MODIFICATION OF STUDY AREA BOUNDARIES FOR ITS AFFILIATES

PUBLIC COMMENT INVITED

On October 31, 1991 ALLTEL Service Corporation, on behalf of its operating affiliates, ALLTEL Pennsylvania, Inc. and Mountain State Telephone Company, filed a petition for waiver of Sections 36.125 (f) and 36.154 (e)(1) and (2), and the definition of "study area" as set forth in Part 36, Subpart H, Appendix Glossary of the Commission's Rules. This waiver would allow these ALLTEL companies to modify their study area boundaries in conjunction with a transfer of certain Mountain State customers and facilities to ALLTEL PA.

Parties may file comments on this petition no later than **December 13, 1991.** Replies should be filed by **January 10, 1992.** Comments should reference AAD 91-72. A copy of each pleading should be sent to Jacqueline Spindler, Common Carrier Bureau, 2000 L Street, N.W., Room 812, Washington, D.C. 20554, and to Downtown Copy Center (DCC), 1114 21st Street, N.W., Washington, D.C. 20036, (202) 452-1422. Copies are available for public inspection and copying in the Accounting and Audits public reference room, 2000 L Street, N.W. Room 812, Washington, D.C. Copies are also available from DCC.

For further information contact Jacqueline Spindler (202) 634-1861.

FEDERAL COMMUNICATIONS COMMISSION

Before the
Federal Communications Commission
Washington, D.C. 20554

PUBLIC NOTICE

Released: November 26, 1991

NEW YORK TELEPHONE AND CHAUTAUQUA AND ERIE TELEPHONE CORPORATION FILE PETITIONS FOR WAIVER OF THE COMMISSION'S RULES RELATING TO STUDY AREA BOUNDARIES AND PRICE CAPS

PUBLIC COMMENT INVITED

On October 25, 1991, New York Telephone Company (NYT) filed a petition for waiver of the definition of "study area" as set forth in Part 36, Appendix-Glossary of the Commission's Rules. This waiver would allow NYT to make the necessary adjustments to its study area boundaries as a result of the sale of its South Ripley telephone exchange to Chautauqua and Erie Telephone Company.

On October 29, 1991, Chautauqua and Erie Telephone Corporation (C&E) filed a related petition for waiver of the definition of "study area," as well as of Sections 36.125(f) and 36.154 (e)(1) and (2), in order to effect the purchase of the South Ripley telephone exchange from NYT. C&E in its petition also requests the waiver of the requirement for them to become a price cap regulated company under Price Caps Merger and Acquisition Rules in Part 61.

Parties may file comments on this petition no later than **December 23, 1991.** Replies should be filed by **January 10, 1992.** Comments should reference AAD 91-73. A copy of each pleading should be sent to Jacqueline Spindler, FCC Common Carrier Bureau, 2000 L Street, N.W., Room 812, Washington, D.C. 20554, and to Downtown Copy Center (DCC), 1114 21st Street, N.W., Washington, D.C. 20036, (202) 452-1422. Copies are available for public inspection and copying in the Accounting and Audits public reference room, 2000 L Street, N.W. Room 812, Washington, D.C. Copies are also available from DCC.

For further information contact Jacqueline Spindler, (202) 634-1861.

FEDERAL COMMUNICATIONS COMMISSION

Before the
Federal Communications Commission
Washington, D.C. 20554

PUBLIC NOTICE

Released: November 26, 1991

NATIONAL EXCHANGE CARRIER ASSOCIATION FILES REVISIONS TO ITS COST ALLOCATION MANUAL

On November 15, 1991, the National Exchange Carrier Association (NECA) filed proposed revisions to its cost allocation manual for the separation of Category I and Category II costs. NECA proposes to revise its manual to reflect new cost allocation procedures. Interested parties may file comments on the proposed revisions by **December 23, 1991.** Replies should be filed by **January 7, 1992.** Comments should reference AAD 91-77. A copy of each pleading should be sent to Alicia Dunnigan, FCC, Common Carrier Bureau, 2000 L Street, N.W., Room 812, Washington, D.C. 20554 and the Downtown Copy Center (DCC), 1114 21st Street, N.W., Washington, D.C. 20036, (202) 452-1422. Copies are available for public inspection and copying in the Accounting and Audits Division public reference room, 2000 L Street, N.W., Room 812, Washington, D.C. Copies are also available from DCC.

For further information contact Alicia Dunnigan, (202) 634-1861.

FEDERAL COMMUNICATIONS COMMISSION

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 87-438

In the Matter of:

Amendment of Section 73.202(b), RM-5894
Table of Allotments,
FM Broadcast Stations.
(West Palm Beach, Florida)

MEMORANDUM OPINION AND ORDER

Adopted: November 12, 1991; Released: November 26, 1991

By the Chief, Policy and Rules Division:

1. The Commission has before it the Petition for Reconsideration filed by Guy Gannett Publishing Company ("Gannett"), licensee of Station WSSP, Channel 281C, Cocoa Beach, Florida, directed against the Report and Order in this proceeding, 3 FCC Rcd 5810 (1988). The Report and Order substituted Channel 282C for Channel 282C1 at West Palm Beach, Florida, and modified the license of Station WEAT-FM, Channel 282C1, West Palm Beach, Florida, to specify operation on Channel 282C. J.J. Taylor Companies, Inc. ("Taylor"), licensee of Station WEAT-FM, filed an Opposition to the Petition for Reconsideration, and Gannett filed a Reply. Subsequently, Gannett filed a Supplement to Petition for Reconsideration and a Motion to Accept. Taylor filed an Opposition to Motion to Accept and a Statement Concerning Supplement to Petition for Reconsideration.[1] Gannett filed a Reply to the Statement. For the reasons discussed below, we will grant the Motion to Accept Supplement and deny the Petition for Reconsideration.

BACKGROUND

2. This proceeding began with the filing of a petition for rule making by Taylor proposing the Channel 282C upgrade at Station WEAT-FM. In response to the Notice of Proposed Rule Making, 2 FCC Rcd 6325 (1987), proposing this upgrade, Gannett filed opposing comments. These comments contended that Channel 282C could not be used at West Palm Beach consistent with the Commission's minimum spacing requirements, FAA tower height restrictions, and the Commission requirement to provide West Palm Beach with a 70 dBu city grade coverage. Gannett also included an airspace analysis indicating that the proposed transmitter site would have an adverse impact on air navigation. Taylor filed a report from another air space consultant indicating that there are potential transmitter sites extending 21 to 29 kilometers from West Palm Beach which should receive a favorable determination from the FAA with an antenna height 1049 feet AMSL. The Report and Order rejected Gannett's arguments and allotted Channel 282C to West Palm Beach with a 26.5 kilometer (16.5 mile) southwest site restriction. In that action, we concluded that Gannett had not shown that Taylor could not secure a transmitter site complying with Commission and FAA requirements, but only that it may be difficult to do so. The Report and Order also included footnote 2 which read as follows:

> Our action is not intended to prejudge the merits of any waiver which petitioner may seek at the application stage. If petitioner is unable to find a suitable site or obtain any requested waiver, we will entertain requests for appropriate action, if any, at that time.

THE PLEADINGS

3. In its Petition for Reconsideration, Gannett specifically states that its reconsideration request is not based upon its "belief that no application complying with the Commission's technical rules can be submitted for Channel 282C at West Palm Beach." Rather, Gannett states that its "dispute" with the Report and Order concerns footnote 2 which, according to Gannett, attempts "to limit the remedies available" in the event a short-spaced application is filed for Channel 282C at West Palm Beach. In this regard, Gannett expresses its view that footnote 2 intimates that a denial of a short-spacing waiver is a prerequisite to revisiting the propriety of the Channel 282C allotment, which is in conflict with the decision in Pinckneyville, Illinois, 41 RR 2d 69 (1977).[2]

4. On September 5, 1989, Gannett filed a Supplement to Petition for Reconsideration and a Motion to Accept. As stated below, the Supplement concerns the application filed by Taylor to implement the Station WEAT-FM upgrade (File No. BPH-890802ID).[3] This application proposed the existing WEAT-FM transmitter site which would not comply with applicable minimum spacing requirements. In support of a waiver request, Taylor stated that it had "searched diligently for a suitable site other than its existing site, but has been unable to find one." According to Gannett, this admission of the unavailability of a "suitable" transmitter site warrants deletion of the allotment.

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[1] We will grant the Motion to Accept because the Supplement will enable us to resolve this proceeding on the basis of a complete record. We will also consider all other responsive pleadings thereto.

[2] In *Pinckneyville*, the Broadcast Bureau deleted a Channel 280A allotment because the proponent and applicant for the allotment failed to show that, at the time of the allotment, there was a reasonable likelihood that a transmitter site would be available that would comply with Commission technical requirements. As such, the allotment rested on a "false premise" and was deleted.

[3] This application was filed pursuant to the equivalent protection criteria of Section 73.215 of the Rules. Section 73.215 became effective on June 26, 1989.

DISCUSSION

5. After carefully considering the record in this proceeding, we believe that the basis set forth in the Report and Order for substituting Channel 282C for Channel 282C1 at West Palm Beach and modifying Station WEAT-FM's license to specify operation on Channel 282C was reasonable. In the Report and Order, we found that Gannett had not shown that Taylor will be unable to locate a site which would comply with the Commission's minimum distance separation requirements and also meet FAA air hazard concerns, but rather only that it may be difficult to do so. We noted that Gannett provided an in-depth analysis of potential air hazards at only one site but Taylor's showing, on the other hand, considered a number of possible areas in which a tower complying with FAA requirements could be located. Since the airspace consultants retained by Gannett and Taylor disagreed as to the availability of a site meeting FAA concerns, we followed our usual practice of deferring a determination as to the suitability of a transmitter site to the application stage when an actual site proposal is before the Commission. Accordingly, we substituted Channel 282C for Channel 282C1 at West Palm Beach because it appeared that there were theoretical sites which would meet both the minimum distance separation requirements and the city grade coverage rule.

6. We continue to believe that this approach is correct. Generally, in rule making proceedings to allot FM channels, there must be a theoretical site which meets the Commission's various technical rules.[4] As long as such a site is shown to exist, we will typically presume at the allotment stage that it is theoretically available and will utilize it as a basis for making allotments. We will, however, take into account a showing by a party that, in reality, no theoretical sites exist because of environmental, air hazard, or other similar considerations.[5] In this case, Gannett did not make such a showing. While Gannett questioned the use of a particular site, it did not rebut Taylor's allegations that there were two other sites theoretically available for a Class C station at West Palm Beach. Under these circumstances, we believe that it was reasonable at the time that we made the allotment to rely upon Taylor's showing that there were other sites that were theoretically available.

7. Even if subsequent events cast doubt upon our reliance on Taylor's engineering and airspace reports, Commission precedent permits an allotment to stand if that reliance was reasonable at the time the allotment decision was originally made. For example, in San Clemente, California, 3 FCC Rcd 6728 (1988), appeal dismissed, 884 F. 2d 1462 (D.C. Cir. 1989), the Commission allotted a Class A FM channel to San Clemente, California, even though the only theoretical sites which would meet our technical rules were located on a military base. Although there were conflicting submissions by the parties concerning the availability of these sites, we made the allotment based upon the representation of a military official that there was no outright proscription on broadcast towers being located on this base and erection of a 300-foot tower would be considered consistent with overriding military uses. Even though the military base subsequently declined to permit the proposed tower construction, we affirmed the allotment and denied a petition for reconsideration because it was reasonable at the time to have relied upon the petitioner's showing.[6]

8. We believe that a similar result is warranted here. Although Taylor subsequently filed an application to upgrade channels at its existing site rather than those specified by its airspace consultant and indicated that it had diligently searched and was unable to find another site, we do not believe that this warrants deletion of the allotment. As in San Clemente, we believe that it was reasonable to rely upon Taylor's engineering and airspace showings because Gannett had not entirely rebutted all of the theoretical sites proposed by Taylor. Moreover, the fact that Taylor filed an application to use its existing site and provide equivalent protection to Gannett's station at Cocoa Beach under Section 73.215 of the Rules does not change this result because it is permitted to select any site that complies with the Commission's technical rules at the application stage.

9. As a final matter, we disagree with Gannett's contention that footnote 2 of the Report and Order limited its remedies under Pinckneyville, supra, because it must await action on any waiver request filed in an application to implement the upgrade before challenging the actual upgrade. On the contrary, footnote 2 did not restrict the rights of Gannett or any interested party to file a petition for reconsideration of the allotment or pursue any other remedy. Indeed, we have dealt with all the arguments raised by Gannett regarding whether the allotment should have been deleted.[7]

10. Accordingly, IT IS ORDERED, That the aforementioned Motion to Accept the Supplement to the Petition for Reconsideration filed by Guy Gannett Publishing Company IS GRANTED.

11. IT IS FURTHER ORDERED, That the aforementioned Petition for Reconsideration and Supplement to Petition for Reconsideration filed by Guy Gannett Publishing Company ARE DENIED.

12. IT IS FURTHER ORDERED, That the aforementioned Petition for Rule Making and Order to Show Cause filed by Guy Gannett Publishing Company IS DISMISSED.

FEDERAL COMMUNICATIONS COMMISSION

Douglas W. Webbink
Chief, Policy and Rules Division
Mass Media Bureau

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[4] *See, e.g., Randolph and Brandon, VT,* 6 FCC Rcd 1760, 1764 n. 4 (1991); *see also Key West, Florida,* 3 FCC Rcd 6423 (1988).

[5] *Id.*

[6] Likewise, in Pinckneyville, we specifically stated that even if an applicant for the allotment were forced to specify a site not in compliance with the Commission's minimum spacing requirements, this does not cast doubt on the underlying allotment if there had been a reasonable basis for determining that a site would be available. *See* 41 RR 2d at 71-72.

[7] In a related vein, Gannett has also filed on September 6, 1989, a "Petition for Rule Making and Order to Show Cause." That Petition requests the substitution of Channel 282C1 for Channel 282C at West Palm Beach, and modification of the Station WEAT-FM license to specify operation on Channel 282C1. Gannett has advanced the same arguments in support of that Petition and in the Supplement in this proceeding. For the reasons discussed above, we are also dismissing the Petition for Rule Making and Order to Show Cause.

Before the
Federal Communications Commission
Washington, D.C. 20554

In Re Applications of

ADVANCED COMMUNICATIONS CORPORATION — File Nos. DBS-84-01/88-05MP

HUGHES COMMUNICATIONS GALAXY, INC. — File Nos. DBS-84-02/88-07MP

For Allocation of Direct Broadcast Satellite Channels and Orbital Positions

MEMORANDUM OPINION AND ORDER

Adopted: November 12, 1991; Released: November 26, 1991

By the Commission:

INTRODUCTION

1. In *Advanced Communications Corp.*, 6 F.C.C. Rcd. 2269 (1991), we found that Advanced Communications Corporation (Advanced) and Hughes Communications Galaxy, Inc. (Hughes), had established due diligence in contracting for their direct broadcast satellite (DBS) systems. Therefore, consistent with our DBS procedures, we assigned each of them specific orbital positions and channels.[1] We consider here petitions for partial reconsideration of that action filed May 30, 1991, by Tempo Satellite, Inc. (Tempo) and Direct Broadcasting Satellite Corporation (Direct),[2] and related pleadings.[3] Direct holds a conditional DBS permit and Tempo is a DBS applicant.[4] We shall deny the petitions for reasons that follow.

BACKGROUND

2. Our first decision in this proceeding contains an outline of the Advanced and Hughes DBS proposals, and of our DBS regulatory scheme. Briefly, DBS applicants first receive conditional permits for their proposed systems, after which they have one year to establish "due diligence" in constructing or contracting for their satellites. If they meet that test, we grant them specific orbital positions and channels. Such allocations are made on a firstcome, first-served basis. *See Direct Broadcast Satellite Service*, 95 F.C.C. 2d 250, 253 (1983); 47 C.F.R. 100.15(b). Further, section 100.13(b) provides that we "shall generally consider all frequencies and orbital positions to be of equal value...." By treaty, the United States is assigned eight orbital positions. Four of these (61.5^0W, 101^0W, 110^0W and 119^0W) are referred to as eastern orbital positions and the remaining four (148^0W, 157^0W, 166^0W and 175^0W) as western positions. In order to make maximum use of the available orbital positions and channels, we concluded in *Continental* that we should not authorize a DBS system proposing to provide western half-CONUS coverage[5] from an eastern orbital position.[6] Instead, we decided to authorize DBS systems that would provide service to the entire continental United States from east/west pairs of orbital positions, with satellites at each position providing service to the respective halves of the country.[7] The modified authorizations granted to Advanced and Hughes are consistent with these require-

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[1] We also granted Advanced and Hughes extensions of time to construct their DBS systems. That action is not contested here.

[2] On June 5, 1991, Continental Satellite Corporation also filed a petition for reconsideration. The Commission released its decision on April 30, 1990. Under sections 1.4, 1.103 and 1.106 of the Rules, May 31, 1991, became the last day for filing petitions for reconsideration. Continental requests consideration of its tardy petition because it was in the midst of a move of its corporate offices. The Commission lacks authority to extend the 30-day filing period specified in section 405 of the Act, unless narrowly defined "extraordinary circumstances" exist. *Gardner v. FCC*, 530 F.2d 1086, 1091-92 (D.C. Cir. 1976). Continental's showing falls far short of that standard. Accordingly, Continental's petition cannot be considered and will be dismissed. *Reuters, Ltd. v. FCC*, 781 F.2d 946, 951-52 (D.C. Cir. 1986); *Richardson Independent School District*, 5 F.C.C. Rcd. 3135, 3136 (1990).

[3] The related pleadings are: oppositions filed June 24, 1991, by Advanced and Hughes; and a reply filed July 5, 1991, by Tempo. Direct did not file a reply pleading.

[4] We disagree with Hughes' assertion that Tempo lacks standing in this proceeding. Although Tempo's position is different from other DBS permittees, we have reserved enough channels to accommodate Tempo's proposed DBS system. *Continental Satellite Corp.*, 4 F.C.C. Rcd. 6292, 6298-99, 6294 n. 43 (1989), *reconsideration pending*. Because of the first-come, first-served policy, every DBS permittee and Tempo have an interest in the allocation of channels and orbital positions to earlier filed DBS permittees. That interest, in our view, is sufficient to establish that Tempo is a "person aggrieved, " within the meaning of section 405 of the Communications Act of 1934, as amended, 47 U.S.C. 405 (1988). Unlike Tempo, however, Direct did not participate at the first stage of this proceeding. In such circumstances, section 1.106(b)(1) of the Rules requires that Direct "show good reason why it was not possible for [it] to participate in the earlier stages of the proceeding." Direct has not made such a showing, and its petition will be dismissed. Because of the public interest questions raised, however, and in our discretion, we shall treat Direct's petition informally.

[5] A DBS satellite providing coverage to half of the continental United States is described as providing half-CONUS coverage, while a satellite covering all of the continental United States is said to provide full-CONUS coverage.

[6] Full-CONUS coverage appears possible from the eastern orbital positions, but might be inconsistent with the interference constraints of the Region 2 Plan for DBS. *Continental*, 4 F.C.C. Rcd. at 6294. Thus, the authorizations granted to Advanced and Hughes permitted full-CONUS coverage from their eastern orbital positions, if they wished to use that option, but we advised them that full-CONUS coverage from those positions was conditional and could be rescinded. *Id.*

[7] *Id.*

ments.[8] Advanced's DBS system specifies two satellites at each orbital position. It proposes to launch its eastern satellites first and to provide full-CONUS coverage from that position temporarily. Thereafter, it proposes to launch its third and fourth satellites for western half-CONUS coverage and to switch its eastern satellites to eastern half-CONUS coverage. Hughes' DBS system calls for three satellites, with two at its eastern orbital position and one at its western position.[9] Those satellites are designed to provide both half- and full-CONUS coverage.

DISCUSSION

3. We assigned channels at western orbital positions 148°W and 157°W to Advanced and Hughes. The petitioners seek to have those positions made available to DBS permittees other than Advanced and Hughes.[10] They specifically urge that those western orbital positions be made available to any permittee proposing eastern half-CONUS coverage from 61.5°W.[11] They make a variety of contentions to support their positions, but essentially raise two broad questions. First, they contend that Advanced and Hughes will not convert their eastern satellites from full-CONUS to half-CONUS coverage, thereby "warehousing" the western orbital positions and channels. Second, they challenge the first-come, first-served basis for awarding specific orbital positions and channels, and the rules and policies adopted in a rulemaking proceeding as to the equality of orbital positions.

4. *Use of Western Orbital Positions.* We consider first the contention that the permittees will not use their western orbital positions and intend to operate instead with full-CONUS coverage from their eastern orbital positions. In *Advanced Communications,* we stated that the temporary authorization for full-CONUS coverage from an eastern orbital position was specifically subject to the condition "that such authorization for full-CONUS service may be modified or rescinded if subsequent technical studies indicate that such service would violate the interference parameters of the Region 2 Plan, or other international treaties or agreements."[12] Thus, whatever Advanced and Hughes might wish to do, there is no certainty that full-CONUS coverage will or can be authorized on a permanent basis. At this time, therefore, we believe western orbital positions must be retained by us and by the permittees to insure a national DBS service. *Orbital Allocations,* 6 F.C.C. Rcd. at 2581. Further, both permittees have executed contracts obligating them to purchase satellites for the western orbital positions. Advanced also notes that it strongly supported the paired east/west orbital proposal,[13] and both permittees provide reasons supporting their use of paired east/west satellites providing half-CONUS coverage. They state that the use of paired east/west satellites will permit smaller receiving antennas, provide more reliable availability for spare transponders, and allow the same programming to be transmitted at different times in the eastern and western halves of the country. In contrast, the petitioners allege no specific facts to support their belief that Advanced and Hughes intend to warehouse their western positions and channels. The petitioners' position is entirely speculative. On this point, therefore, they have failed to establish any basis for reconsidering our decision.[14]

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[8] We authorized Hughes to use channels 1 through 22, 24, 26, 28, 30 and 32 at 101°W and at 157°W, and Advanced to use channels 1 through 23, 25, 27, 29 and 31 at 110°W and channels 1 through 17, 19, 21, 23, 25, 27, 29 and 31 at 148°W. Because Advanced would need an additional satellite for its remaining three western channels, and because it had not established due diligence in contracting for such a satellite, we could not assign specific channels for the three remaining western channels requested by Advanced. *Advanced Communications Corp,* 6 F.C.C. Rcd. 2269, 2272 (1991)(*Advanced Communications).* Advanced may, of course, negotiate for channels on a western satellite of another DBS permittee instead of building its own three-channel satellite.

[9] On July 15, 1991, Hughes filed a minor modification application for its DBS system. That application does not affect the substance of this proceeding.

[10] We previously awarded orbital positions and channels, after an appropriate due diligence showing, to United States Satellite Broadcasting Company, Inc. *United States Satellite Broadcasting Co.,* 5 F.C.C. Rcd. 7576 (1990). Its eight eastern channels are at orbital positions 101°W (channels 23, 25, 27, 29 and 31) and 110°W (channels 28, 30 and 32), and its eight western channels are all at 148°W (even channels from 18 through 32). Thus, eight of the channels at 148°W, one of the orbital positions of interest to the petitioners, have already been allocated. That action is final and is not the subject of either petition before us here. In a similar vein, Advanced correctly notes that it received specific authorizations for the 16 odd-numbered channels at 110°W and 148°W in 1989. *Continental,* 4 F.C.C. Rcd. at 6301, 6304 n. 42. No party challenged the award of the channels at 110°W. Tempo sought reconsideration of the allocation of the 16 odd-numbered channels at 148°W, which is pending. Specifically before us here, however, is the award to Advanced of the evennumbered channels from 2 through 16 at 148°W, which accommodate Advanced's subsequently granted modification application. Further, the petitioners do not challenge the assignment of channels to Hughes at 101°W. Therefore, only the 27 channels awarded to Hughes at 157°W are encompassed by the petitions before us here.

[11] Tempo requests grants to Advanced and Hughes conditioned "upon the ability of DBS systems operating at 61.5°W to provide adequate service to the entire country using 166°W or 175°W as complementary orbital positions." Direct asserts that a DBS system operating from 61.5°W and either 166°W or 175°W cannot "adequately" serve all of the continental United States. In Direct's opinion, we should use this proceeding "to review the technical data and decide one way or the other on the permissibility of full-CONUS service."

[12] We have also observed in this regard that "it is unclear whether full-CONUS delivery will be either permanently or exclusively required. Given this present uncertainty as to the extent to which full-CONUS delivery will prove viable, we find it prudent at this time to maintain the availability of DBS western orbital locations for DBS service." *Orbital Allocations in the DBS Service,* 6 F.C.C. Rcd. 2581, 2581 (1991)(*Orbital Allocations).*

[13] Advanced's support for paired orbital positions was specifically noted in *Orbital Allocations,* 6 F.C.C. Rcd. at 2581.

[14] If, in fact, technical advances and experience subsequently establish that full-CONUS coverage is consistent with our treaty obligations and the public interest, we can address the use of western orbital positions that a permittee might later determine in good faith are not needed for its DBS system. For the reasons stated in *Orbital Allocations,* however, neither we nor DBS permittees are now in a position to make such judgments. Accordingly, we reject Direct's suggestion that Advanced and Hughes should be compelled to elect within 60 days (or some other short period) whether they will operate full- or half-CONUS from their eastern orbital positions on a permanent basis.

5. *Equality of Orbital Positions.* When we proposed rules for the DBS service, we sought comment on licensing requirements, including the concept that all orbital positions and channels should be considered to be of equal value for the purpose of granting specific authorizations. *Direct Broadcast Satellite Services*, 86 F.C.C. 2d 719, 753 (1981). After review of the comments received, we incorporated the orbital-equality concept in section 100.13(b) of the Rules. *Direct Broadcast Satellites*, 90 F.C.C. 2d 676, 719 (1982). DBS permittees have been expressly reminded of this policy in subsequent decisions. Direct Broadcast Satellite Service, 95 F.C.C. 2d 250, 253 (1983). The following statement from *Continental* is particularly relevant here:

> When authorized for half-CONUS service and allocated in east/west pairs, it is still not definite that any particular eastern orbit/channel allocation has an intrinsic value greater than any other western allocation. Accordingly, the rule that orbital locations will be considered of equal value... is dispositive of any claim that applicants should be entitled to particular orbital positions.

4 F.C.C. Rcd. at 6294.

6. The first-come, first-served policy may be relevant to individual permittees, which might view particular orbital positions as more preferable for their purposes.[15] Permittees that desire particular orbital positions are encouraged to contract for their satellites and to submit their due diligence showings at the earliest opportunity. Advanced and Hughes have done so. Further, the assertions of the petitioners that orbital positions at 166^0W and 175^0W are not suitable for full-CONUS service when paired with an eastern satellite at 61.5^0W are not supported by any engineering showing to that effect.[16] The petitioners have failed, therefore, to establish that we should act in this applications proceeding to overturn a requirement established in a rulemaking proceeding. Nor have they provided any substantial reason for initiating a rulemaking proceeding on this subject on our own motion. The Advanced and Hughes requests for orbital positions and channels comply fully with our existing requirements, and there is no basis to require them to move their western satellites to 166^0W or 175^0W. Therefore, the public interest will not be served by a grant of the petitions for reconsideration.

7. Accordingly, IT IS ORDERED that the petition for reconsideration filed by: (1) Tempo Satellite, Inc., IS DENIED; (2) Direct Broadcast Satellite Corporation IS DISMISSED, and when considered informally, IS DENIED; and (3) Continental Satellite Corporation IS DISMISSED.

8. The Mass Media Bureau is directed to send copies of this decision to the parties by certified mail, return receipt requested.

FEDERAL COMMUNICATIONS COMMISSION

Donna R. Searcy
Secretary

[15] Full-CONUS coverage from the easternmost orbital position is uncertain at this time and is not possible from the westernmost positions. So, for example, applicants such as Advanced and Hughes that propose an initial, temporary step of providing full-CONUS coverage from one orbital position are encouraged to work with their satellite builders and establish due diligence promptly to enhance their ability to obtain orbital positions consistent with their plans.

[16] Contrary to the petitioners' apparent suggestion, we did not question the suitability of any orbital position for half-CONUS coverage in *Orbital Allocations*. See 6 F.C.C. Rcd. at 2583 n. 1. The uncertainties mentioned in that case went to the suitability of some of the orbital positions for full-CONUS coverage. We also addressed the potential for DBS service in Alaska and Hawaii in *Orbital Allocations*. *Id.* at 2582. We need not revisit that subject here.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 90-382

In re Applications of

Evelyn Roy Rogers and Morris A. Rogers d/b/a THE DUNLIN GROUP	File No. BPH-880629MC
SEASIDE WIRELESS, LTD., L.P.	File No. BPH-880701MF
H. H.& L., INC., d/b/a H. H.& L. COMMUNICATIONS	File No. BPH-880701MM

For Construction Permit for
New FM Station, Channel 280A,
Seaside, California

ORDER

Adopted: November 8, 1991; Released: November 26, 1991

By the Commission:

1. In this comparative proceeding, H. H.& L. Communications (HHL) seeks review of a Review Board memorandum opinion and order that reinstated the competing application of Seaside Wireless, Ltd. (Wireless). *The Dunlin Group*, 6 FCC Rcd 4642 (Rev. Bd. 1991).[1] HHL's application for review is procedurally defective and will be dismissed.

I. BACKGROUND

2. Administrative Law Judge Richard L. Sippel dismissed Wireless' application for failing to comply with his prior order requiring the appearance at hearing of former Wireless principal, Ethel M. Mike. *The Dunlin Group*, FCC 91M-1905 (Jun. 28, 1991); FCC 91M-1779 (Jun. 3, 1991). Mike withdrew as Wireless' 50 percent general partner two weeks before the exchange date for direct case exhibits. Nonetheless, the ALJ required that Mike be made available for cross examination and subsequently found that Wireless had lacked diligence in failing either to produce Mike at the opening of the hearing or to timely request a subpoena. He therefore dismissed Wireless' application.

3. The Board disagreed with the ALJ's ruling, finding that the ALJ did not have adequate grounds on which to dismiss Wireless' application. The Board held that Wireless' conduct in failing to comply with the ALJ's order requiring the appearance of Mike was neither plainly defiant nor "inexcusably slothful." 6 FCC Rcd at 4644 ¶ 11. Absent such egregrious conduct, the Board ruled that dismissal was unwarranted.

II. DISCUSSION

4. In its application for review, HHL argues that -- contrary to the Board's ruling -- the ALJ had ample grounds to dismiss Wireless' application. However, HHL's application for review is procedurally defective. Under 47 C.F.R. § 1.115(e)(1): "[a]pplications for review of interlocutory rulings made by the Review Board . . . shall be filed only as part of the application for review of the Board's final decision. . . ."[2] *See Fresno FM Limited Partnership*, 5 FCC Rcd 7261 ¶¶ 4-5 (1990). The Board's order here is interlocutory; it did not terminate HHL's right to participate in this proceeding and it did not deny HHL's application. HHL has not requested a waiver of Section 1.115(e)(1); nor has it otherwise asserted any compelling and urgent circumstances that would warrant waiver of the rule. HHL merely contends that the Board's ruling is erroneous, a matter that can be properly raised at the time of the Board's final decision. HHL's application for review will therefore be dismissed.

III. ORDER

5. ACCORDINGLY, IT IS ORDERED, That the Application for Review filed July 29, 1991 by H. H. & L. Communications IS DISMISSED.

FEDERAL COMMUNICATIONS COMMISSION

Donna R. Searcy
Secretary

FOOTNOTES

[1] Before the Commission are: (1) an Application for Review filed July 29, 1991 (after adoption but prior to release of the Board's order) by HHL, and (2) an opposition filed August 12, 1991 by Wireless.

[2] The rule specifies certain exceptions that are not relevant here.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 85-269

In re Applications of

DOROTHY O. SCHULZE and DEBORAH BRIGHAM, a General Partnership — File No. BPCT-850320KG

BLANCO COMMUNICATIONS LTD. — File No. BPCT-850320LC

For a Construction Permit for a New Television Station, Channel 52, in Blanco, Texas

ORDER

Adopted: November 12, 1991; Released: November 27, 1991

By the Commission:

1. Opal Chadwell, a former applicant in this proceeding, seeks reconsideration of a Commission order, *Dorothy O. Schulze and Deborah Brigham, a General Partnership*, 6 FCC Rcd 4218 (1991).[1] In that order, the Commission denied review of the Review Board's decision. The Commission upheld the Board's determination that Chadwell's appeal of the ALJ's dismissal of her application for failure to prosecute was grossly untimely. For the reasons that follow, Chadwell's petition for reconsideration will be dismissed.

2. Chadwell's application for a new UHF television station in Blanco, Texas initially was granted by the Review Board, which also denied the competing applications of Blanco and Schulze-Brigham because they made disqualifying misrepresentations during the hearing. *Opal Chadwell*, 2 FCC Rcd 5502 (Rev. Bd. 1987), *affirming*, 1 FCC Rcd 120 (I.D. 1986). However, on review, the Commission added a financial issue against Chadwell and remanded the proceeding for further hearings. *Opal Chadwell*, 4 FCC Rcd 1215 (1989). The ALJ dismissed Chadwell's application during the remand proceedings for willfully failing to comply with discovery orders and for abusing the Commission's processes by advising non-parties against attending depositions. Chadwell did not appeal the ALJ's order at that time.

3. Subsequently, the Commission determined that, in light of Chadwell's dismissal for failure to prosecute after the ALJ had added false certification and candor issues to the remanded financial issue, Blanco should be given a further opportunity to introduce evidence to impeach Chadwell's credibility, since her testimony had earlier resulted in Blanco's disqualification. *See* 5 FCC Rcd at 3229 ¶ 19. Consequently, the Commission set aside the denial of Blanco's application and remanded the proceeding a second time, which comtemplated Chadwell's participation in the proceeding, even though she was no longer a party. *Dorothy O. Schulze and Deborah Brigham, a General Partnership*, 5 FCC Rcd 3227 (1990). Thereafter, Chadwell for the first time appealed the ALJ's dismissal of her application, which had occurred over a year and a half earlier during the first remand proceeding.

4. The Board dismissed Chadwell's appeal as grossly untimely, since it was not filed until 537 days after the release of the ALJ's dismissal order, whereas 47 C.F.R. § 1.301(c)(2) requires that the appeal be filed within 5 days of the release of the order. *See Dorothy O. Schulze and Deborah Brigham, a General Partnership*, 5 FCC Rcd 7381 ¶¶ 2-3. On appeal, the Commission agreed with the Board that the untimeliness of Chadwell's appeal precluded its consideration and that Chadwell had offered no justification for filing her appeal in an untimely manner. Chadwell's petition for reconsideration followed the Commission's action denying review of the Board's dismissal of her appeal.

5. Chadwell's petition for reconsideration is procedurally deficient and will be dismissed. A petition for reconsideration of the Commission's denial of an application for review will be entertained only if one or more of the following circumstances is present:

> (i) The petition relies on facts which relate to events which have occurred or circumstances which have changed since the last opportunity to present such matters; or
>
> (ii) The petition relies on facts unknown to petitioner until after his last opportunity to present such matters which could not, through the exercise of ordinary diligence, have been learned prior to such opportunity.

47 C.F.R. § 1.106(b)(2).

Chadwell's petition for reconsideration fails to present new facts or changed circumstances as required by Section 1.106(b)(2). Rather, Chadwell's petition essentially reargues matters raised in her application for review. We therefore decline to consider these arguments further, since reconsideration will not be granted to debate matters on which we have already deliberated and spoken. *WWIZ Inc.*, 37 FCC 685 (1964), *aff'd sub nom. Lorain Journal Co. v. FCC*, 351 F.2d 824 (D.C. Cir. 1965), *cert. denied*, 383 U.S. 967 (1966).

6. ACCORDINGLY, IT IS ORDERED, That the Petition for Reconsideration filed August 8, 1991 by Opal Chadwell IS DISMISSED.

FEDERAL COMMUNICATIONS COMMISSION

Donna R. Searcy
Secretary

FOOTNOTE

[1] Now before the Commission are a petition for reconsideration filed August 8, 1991 by Chadwell, and an opposition filed August 22, 1991 by Blanco Communications, Ltd.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 91-222

In the Matter of

Amendment of Section 73.202(b), RM-7204
Table of Allotments,
FM Broadcast Stations.
(Crane, Texas)

REPORT AND ORDER
(Proceeding Terminated)

Adopted: November 8, 1991; Released: November 26, 1991

By the Assistant Chief, Allocations Branch:

1. At the request of Albert L. Crain ("petitioner"), permittee of Station KAIR-FM, Channel 265A, Crane, Texas, the Commission has before it the *Notice of Proposed Rule Making*, 6 FCC Rcd 4724 (1991), proposing the substitution of Channel 267C1 for Channel 265A at Crane, Texas, and the modification of Station KAIR-FM's construction permit to specify operation on the higher powered channel. Petitioner filed comments stating his intention to apply for the channel, if allotted. No other comments were received.

2. We believe the public interest would be served by the substitution of Channel 267C1 for Channel 265A at Crane, since it would provide the community with a wide coverage area FM service. Channel 267C1 can be allotted to Crane in compliance with the Commission's minimum distance separation requirements at the site specified in Station KAIR-FM's construction permit.[1] Concurrence of the Mexican government has been obtained, since Crane is located with 320 kilometers (199 miles) of the U.S. Mexican border. As proposed, we will also modify petitioner's construction permit for Station KAIR-FM to specify operation on Channel 267C1 in accordance with the provisions of Section 1.420(g) of the Commission's Rules.

3. Accordingly, pursuant to the authority contained in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61, 0.204(b) and 0.283 of the Commission's Rules, IT IS ORDERED, That effective **January 10, 1992,** the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, IS AMENDED, with respect to the community listed below, to read as follows:

City	Channel No.
Crane, Texas	267C1

4. IT IS FURTHER ORDERED, pursuant to Section 316(a) of the Communications Act of 1934, as amended, that the license of Albert L. Crain for Station KAIR-FM, Crane, Texas, IS MODIFIED to specify operation on Channel 267C1, in lieu of Channel 265A, subject to the following conditions:

(a) Within 90 days of the effective date of this Order, the permittee shall submit to the Commission a minor change application for a construction permit (Form 301).

(b) Upon grant of the construction permit, program tests may be conducted in accordance with Section 73.1620.

(c) Nothing contained herein shall be construed to authorize a change in transmitter location or to avoid the necessity of filing an environmental impact statement pursuant to Section 1.1301 of the Commission's Rules.

5. IT IS FURTHER ORDERED, That this proceeding IS TERMINATED.

6. For further information concerning this proceeding, contact Pamela Blumenthal, Mass Media Bureau, (202) 634-6530.

FEDERAL COMMUNICATIONS COMMISSION

Michael C. Ruger
Assistant Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

[1] The coordinates for Channel 267C1 at Crane are North Latitude 31-21-56 and West Longitude 102-20-22.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 91-245

In the Matter of

Amendment of Section 73.202(b), RM-7775
Table of Allotments,
FM Broadcast Stations.
(Prairie Grove, Arkansas)

REPORT AND ORDER
(Proceeding Terminated)

Adopted: November 8, 1991; Released: November 26, 1991

By the Assistant Chief, Allocations Branch:

1. The Commission considers herein the Notice of Proposed Rule Making, 6 FCC Rcd 4971 (1991), issued in response to a petition filed on behalf of Vinewood Communications, a Limited Partnership ("petitioner"), proposing the substitution of Channel 235C2 for Channel 235A at Prairie Grove, Arkansas, and modification of the permit for Station KDAB(FM) accordingly. Petitioner filed supporting comments stating its intention to apply for Channel 235C2, if it is allotted to Prairie Grove, as requested. No other comments were received.

2. We believe the public interest would be served by substituting Channel 235C2 for Channel 235A at Prairie Grove since it could provide an enhanced service to the community. Therefore, in accordance with the provisions of Section 1.420(g) of the Commission's Rules, we will substitute Channel 235C2 for Channel 235A and modify the permit of Vinewood Communications, a Limited Partnership, as requested. As indicated in the Notice, Channel 235C2 can be allotted to Prairie Grove consistent with the minimum distance separation requirements of Section 73.207(b) of the Commission's Rules at the petitioner's specified site.[1]

3. Accordingly, pursuant to the authority contained in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61, 0.204(b) and 0.283 of the Commission's Rules, IT IS ORDERED, That effective **January 10, 1992,** the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, IS AMENDED with respect to the community listed below, as follows:

City	Channel No.
Prairie Grove, Arkansas	235C2

4. IT IS FURTHER ORDERED, That pursuant to Section 316(a) of the Communications Act of 1934, as amended, the construction permit of Vinewood Communications, a Limited Partnership (BPH-900202MJ) for Station KDAB(FM), IS MODIFIED to specify operation on Channel 235C2 in lieu of Channel 235A, subject to the following conditions:

(a) Within 90 days of the effective date of this *Order,* the permittee shall submit to the Commission a minor change application for a construction permit (Form 301), specifying the new facility;

(b) Upon grant of the construction permit, program tests may be conducted in accordance with Section 73.1620; and

(c) Nothing contained herein shall be construed to authorize a change in transmitter location or to avoid the necessity of filing an environmental impact statement pursuant to Section 1.1301 of the Commission's Rules.

5. Pursuant to Commission Rule Section 1.1104(1)(k) and (2)(k), any party seeking a change of community of license of an FM or television allotment or an upgrade of an existing FM allotment, **if the request is granted,** must submit a rule making fee when filing its application to implement the change in community of license and/or upgrade. As a result of this proceeding, Vinewood Communications, a Limited Partnership, permittee of Station KDAB(FM), is required to submit a rule making fee in addition to the fee required for the applications to effect the upgrade.

6. IT IS FURTHER ORDERED, That this proceeding IS TERMINATED.

7. For further information concerning the above, contact Nancy Joyner, Mass Media Bureau, (202) 634-6530.

FEDERAL COMMUNICATIONS COMMISSION

Michael C. Ruger
Assistant Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

[1] Coordinates for Channel 235C2 at Prairie Grove are 35-51-00 and 94-23-00.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 91-246

In the Matter of

Amendment of Section 73.202(b), RM-7665
Table of Allotments,
FM Broadcast Stations.
(Bay Minette, Alabama)

REPORT AND ORDER
(Proceeding Terminated)

Adopted: November 8, 1991; Released: November 26, 1991

By the Assistant Chief, Allocations Branch:

1. Before the Commission for consideration is the *Notice of Proposed Rule Making*, 6 FCC Rcd 4973 (1991), issued in response to a petition for rule making filed on behalf of Baldwin Broadcasting Company ("petitioner"), permittee of Station WFMI(FM), Channel 293A, Bay Minette, Alabama, proposing the substitution of Channel 293C3 for Channel 293A and a modification of its permit accordingly. Petitioner filed comments in support of the proposal reiterating its intention to apply for the channel if allotted. No other comments were received.

2. We believe the public interest would be served by substituting Channel 293C3 for Channel 293A at Bay Minette since it could provide the community with an expanded coverage FM service. As stated in the *Notice*, Channel 293C3 can be allotted to Bay Minette at the petitioner's specified site[1] in conformity with the minimum distance separation requirements of Section 73.207(b)(1) of the Commission's Rules. However, the issuance of a license for Channel 293C3 may be withheld until Station WGUD-FM, Pascagoula, Mississippi, is licensed on Channel 290C3.[2] In accordance with the provisions of Section 1.420(g) of the Commission's Rules, we are modifying herein the petitioner's permit for Station WFMI(FM) at Bay Minette, Alabama, to specify operation on Channel 293C3, as requested.

3. Accordingly, pursuant to the authority contained in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61, 0.204(b) and 0.283 of the Commission's Rules, IT IS ORDERED, That effective **January 10, 1992,** the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, IS AMENDED with respect to the community listed below, as follows:

City	Channel No.
Bay Minette, Alabama	288A, 293C3

4. IT IS FURTHER ORDERED, That pursuant to Section 316(a) of the Communications Act of 1934, as amended, the construction permit of Baldwin Broadcasting Company for Station WFMI(FM), Bay Minette, Alabama (BPH-880805MW), IS MODIFIED to specify operation on Channel 293C3 in lieu of Channel 293A, subject to the following conditions:

(a) Within 90 days of the effective date of this *Order*, the permittee shall submit to the Commission a minor change application for a construction permit (Form 301), specifying the new facility;

(b) Upon grant of the construction permit, program tests may be conducted in accordance with Section 73.1620; and

(c) Nothing contained herein shall be construed to authorize a change in transmitter location or to avoid the necessity of filing an environmental impact statement pursuant to Section 1.1301 of the Commission's Rules.

5. Pursuant to Commission Rule Section 1.1104(1)(k) and (2)(k), any party seeking a change of community of license of an FM or television allotment or an upgrade of an existing FM allotment, **if the request is granted,** must submit a rule making fee when filing its application to implement the change in community of license and/or upgrade. As a result of this proceeding, Baldwin Broadcasting Company, permittee of Station WFMI(FM), is required to submit a rule making fee in addition to the fee required for the applications to effect the upgrade.

6. IT IS FURTHER ORDERED, That the Secretary of the Commission shall send a copy of this *Order* by Certified Mail, Return Receipt Requested, to the licensee of Station WGUD-FM, Pascagoula, Mississippi, as follows: WGUD Stereo, Inc., P.O. Box 307, Pascagoula, MS 39568.

7. IT IS FURTHER ORDERED, That this proceeding IS TERMINATED.

8. For further information concerning the above, contact Nancy Joyner, Mass Media Bureau, (202) 634-6530.

FEDERAL COMMUNICATIONS COMMISSION

Michael C. Ruger
Assistant Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

[1] Coordinates at the petitioner's specified site for Channel 293C3 are 30-42-30 and 87-49-35.

[2] Station WGUD-FM was modified from Channel 292A to Channel 290C3 in MM Docket No. 86-55. *See* 4 FCC Rcd 7556 (1989). A construction permit has been issued to Station WGUD-FM on Channel 290C3 at coordinates 30-24-19 and 88-47-26 (BPH-900223IC).

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 91-242

In the Matter of

Amendment of Section 73.202(b), RM-7329
Table of Allotments,
FM Broadcast Stations.
(Bay City, Texas)

REPORT AND ORDER
(Proceeding Terminated)

Adopted: November 7, 1991; Released: November 26, 1991

By the Assistant Chief, Allocations Branch:

1. At the request of Sandlin Broadcasting Company, Inc. ("petitioner"), licensee of Station KMKS-FM, Channel 273C2, Bay City, Texas, the Commission has before it the *Notice of Proposed Rule Making*, 6 FCC Rcd 5005 (1991), proposing the substitution of Channel 273C1 for Channel 273C2 at Bay City, and the modification of Station KMKS-FM's license to specify operation on the higher powered channel. Petitioner filed comments stating its intention to apply for the channel, if allotted. No other comments were received.

2. We believe the public interest would be served by the substitution of Channel 273C1 for Channel 273C2 at Bay City, since it would provide the community with a wider coverage area FM service. Channel 273C1 can be allotted to Bay City in compliance with the Commission's minimum distance separation requirements with a site restriction of 47.0 kilometers (29.2 miles) west of the community in order to avoid short-spacing conflicts with Station KMJQ-FM, Channel 271C, Houston, Texas, and the pending applications for the vacant but applied for Channel 273C2 at Beaumont, Texas.[1] As proposed, we will also modify petitioner's license for Station KMKS-FM to specify operation on Channel 273C1 in accordance with the provision of Section 1.420(g) of the Commission's Rules.

3. Accordingly, pursuant to the authority contained in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61, 0.204(b) and 0.283 of the Commission's Rules, IT IS ORDERED, That effective **January 10, 1992,** the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, IS AMENDED, with respect to the community listed below, to read as follows:

City	Channel No.
Bay City, Texas	221A, 273C1, 241C2

4. IT IS FURTHER ORDERED, pursuant to Section 316(a) of the Communications Act of 1934, as amended, that the license of Sandlin Broadcasting Company, Inc., for Station KMKS-FM, Bay City, Texas, IS MODIFIED to specify operation on Channel 273C1, in lieu of Channel 273C2, subject to the following conditions:

(a) Within 90 days of the effective date of this *Order*, the licensee shall submit to the Commission a minor change application for a construction permit (Form 301).

(b) Upon grant of the construction permit, program tests may be conducted in accordance with Section 73.1620.

(c) Nothing contained herein shall be construed to authorize a change in transmitter location or to avoid the necessity of filing an environmental impact statement pursuant to Section 1.1301 of the Commission's Rules.

5. IT IS FURTHER ORDERED, That this proceeding IS TERMINATED.

6. For further information concerning this proceeding, contact Pamela Blumenthal, Mass Media Bureau, (202) 634-6530.

FEDERAL COMMUNICATIONS COMMISSION

Michael C. Ruger
Assistant Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

[1] The coordinates for Channel 273C1 at Bay City are North Latitude 29-06-00 and West Longitude 96-26-00.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 91-341

In the Matter of

Amendment of Section 73.202(b), RM-7836
Table of Allotments,
FM Broadcast Stations.
(Altamont, Oregon)

NOTICE OF PROPOSED RULE MAKING

Adopted: November 7, 1991; Released: November 26, 1991

Comment Date: January 17, 1992
Reply Comment Date: February 3, 1992

By the Assistant Chief, Allocations Branch:

1. The Commission has before it the petition for rule making filed by Western States Broadcasting ("petitioner") requesting the substitution of Channel 243C1 for Channel 267C at Altamont, Oregon, and the modification of its license for Station KCHQ(FM) to specify operation on the lower class channel.[1] Petitioner states that it will apply for the channel, if allotted.

2. Petitioner states that it presently provides an inadequate signal to Altamont because of the need to use a transmitter site over 20 kilometers to the east and because of the hilly terrain between the transmitter site and Altamont. However, if Channel 243C1 is substituted for Channel 267C, petitioner avers that it could provide the community with improved service by relocating its transmitter to Chase Mountain. According to the petitioner, Channel 267 cannot be used at its desired Chase Mountain site and comply with the Commission's minimum distance separation requirements.

3. We believe the public interest would be served by proposing the substitution of Channel 243C1 for Channel 267C at Altamont, Oregon, since it could provide the community with improved service. Channel 243C1 can be allotted to Altamont in compliance with the Commission's minimum distance separation requirements with a site restriction of 24.8 kilometers (15.5 miles) southwest to accommodate petitioner's desired transmitter site.[2] As requested, we also propose to modify petitioner's license for Station KCHQ to specify operation on Channel 243C1 in lieu of its present Channel 267C.[3]

4. Accordingly, we seek comments on the proposed amendment of the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, for the community listed below, to read as follows:

	Channel No.	
City	Present	Proposed
Altamont, Oregon	267C	243C1

5. The Commission's authority to institute rule making proceedings, showings required, cut-off procedures, and filing requirements are contained in the attached Appendix and are incorporated by reference herein. In particular, we note that a showing of continuing interest is required by paragraph 2 of the Appendix before a channel will be allotted.

6. Interested parties may file comments on or before **January 17, 1992,** and reply comments on or before **February 3, 1992,** and are advised to read the Appendix for the proper procedures. Comments should be filed with the Secretary, Federal Communications Commission, Washington, D.C. 20554. Additionally, a copy of such comments should be served on the petitioner, or its counsel or consultant, as follows:

Jay Stevens
Western States Broadcasting
1415 Laverne Street
Klamath Falls, Oregon 97603
(Petitioner)

7. The Commission has determined that the relevant provisions of the Regulatory Flexibility Act of 1980 do not apply to rule making proceedings to amend the FM Table of Allotments, Section 73.202(b) of the Commission's Rules. *See Certification That Sections 603 and 604 of the Regulatory Flexibility Act Do Not Apply to Rule Making to Amend Sections 73.202(b), 73.504 and 73.606(b) of the Commission's Rules,* 46 FR 11549, February 9, 1981.

8. For further information concerning this proceeding, contact Leslie K. Shapiro, Mass Media Bureau, (202) 634-6530. For purposes of this restricted notice and comment rule making proceeding, members of the public are advised that no *ex parte presentations* are permitted from the time the Commission adopts a Notice of Proposed Rule Making until the proceeding has been decided and such decision is no longer subject to reconsideration by the Commission or review by any court. An *ex parte* presentation is not prohibited if specifically requested by the Commission or staff for the clarification or adduction

[1] Petitioner alternatively requests the reallotment of Channel 300C1 from Mount Shasta, California, to Altamont, without replacement. However, the license of Mount Shasta Station KEDY has been modified to specify operation on Channel 300C1 pursuant to the *Report and Order* in MM Docket No. 88-28. See 5 FCC Rcd 4558 (1990), *recon. pending*. Therefore, we will not consider this portion of petitioner's request.

[2] The coordinates for Channel 243C1 at Altamont are North Latitude 42-05-36 and West Longitude 121-59-35.

[3] Channel 254C1 can be allotted to Altamont to accommodate any competing expression of interest which may be filed. Channel 254C1 can be allotted to Altamont in compliance with the Commission's minimum distance separation requirements, without the imposition of a site restriction, at coordinates North Latitude 42-12-25 and West Longitude 121-44-10.

of evidence or resolution of issues in the proceeding. However, any new written information elicited from such a request or a summary of any new oral information shall be served by the person making the presentation upon the other parties to the proceeding unless the Commission specifically waives this service requirement. Any comment which has not been served on the petitioner constitutes an ex parte presentation and shall not be considered in the proceeding. Any reply comment which has not been served on the person(s) who filed the comment, to which the reply is directed, constitutes an *ex parte* presentation and shall not be considered in the proceeding.

FEDERAL COMMUNICATIONS COMMISSION

Michael C. Ruger
Assistant Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

APPENDIX

1. Pursuant to authority found in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61 0.204(b) and 0.283 of the Commission's Rules, IT IS PROPOSED TO AMEND the FM Table of Allotments, Section 73.202(b) of the Commission's Rules and Regulations, as set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached.

2. *Showings Required.* Comments are invited on the proposal(s) discussed in the *Notice of Proposed Rule Making* to which this Appendix is attached. Proponent(s) will be expected to answer whatever questions are presented in initial comments. The proponent of a proposed allotment is also expected to file comments even if it only resubmits or incorporates by reference its former pleadings. It should also restate its present intention to apply for the channel if it is allotted and, if authorized, to build a station promptly. Failure to file may lead to denial of the request.

3. *Cut - off Procedures.* The following procedures will govern the consideration of filings in this proceeding.

(a) Counterproposals advanced in this proceeding itself will be considered if advanced in initial comments, so that parties may comment on them in reply comments. They will not be considered if advanced in reply comments. *(See* Section 1.420(d) of the Commission's Rules.)

(b) With respect to petitions for rule making which conflict with the proposal(s) in this *Notice*, they will be considered as comments in the proceeding, and Public Notice to this effect will be given as long as they are filed before the date for filing initial comments herein. If they are filed later than that, they will not be considered in connection with the decision in this docket.

(c) The filing of a counterproposal may lead the Commission to allot a different channel than was requested for any of the communities involved.

4. *Comments and Reply Comments; Service.* Pursuant to applicable procedures set out in Sections 1.415 and 1.420 of the Commission's Rules and Regulations, interested parties may file comments and reply comments on or before the dates set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached. All submissions by parties to this proceeding or by persons acting on behalf of such parties must be made in written comments, reply comments, or other appropriate pleadings. Comments shall be served on the petitioner by the person filing the comments. Reply comments shall be served on the person(s) who filed comments to which the reply is directed. Such comments and reply comments shall be accompanied by a certificate of service. *(See* Section 1.420(a), (b) and (c) of the Commission's Rules.)

5. *Number of Copies.* In accordance with the provisions of Section 1.420 of the Commission's Rules and Regulations, an original and four copies of all comments, reply comments, pleadings, briefs, or other documents shall be furnished the Commission.

6. *Public Inspection of Filings.* All filings made in this proceeding will be available for examination by interested parties during regular business hours in the Commission's Public Reference Room at its headquarters, 1919 M Street N.W., Washington, D.C.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 91-80

In the Matter of

Amendment of Section 73.202(b), RM-7672
Table of Allotments,
FM Broadcast Stations.
(Derby Center, Vermont)

REPORT AND ORDER
(Proceeding Terminated)

Adopted: November 7, 1991; Released: November 26, 1991

By the Assistant Chief, Allocations Branch:

1. At the request of Steele Communications Company, Inc. ("petitioner"), licensee of Station WMOO-FM, Channel 221A, Derby Center, Vermont, the Commission has before it the *Notice of Proposed Rule Making*, 6 FCC Rcd 1849 (1991), proposing the substitution of Channel 221C3 for Channel 221A at Derby Center, and modification of Station WMOO-FM's construction permit to specify operation on the higher powered channel. Petitioner filed comments stating its intention to apply for channel, if allotted. No other comments were received.

2. We believe the public interest will be served by substituting Channel 221C3 for Channel 221A, since it would provide Derby Center with an expanded coverage area FM service. Channel 221C3 can be allotted to Derby Center in compliance with the Commission's minimum distance separation requirements with respect to all domestic allotments, with a site restriction of 5.4 kilometers (3.4 miles) northeast to accommodate petitioner's desire to use its present licensed transmitter site.[1] We note the allotment to Derby Center does not meet the required mileage separation to Station CBMB(FM), Channel 219B, Sherbrooke, Quebec and to unoccupied Channel 221A at Drummondville, Quebec, Canada. Because the allotment to Derby Center creates short-spacing conflicts to Canadian stations, we have obtained Canadian approval for Channel 221C3 at Derby Center as a specially negotiated short-spaced allotment. As proposed, we will also modify petitioner's license for Station WMOO-FM to specify operation on Channel 221C3 in accordance with the provisions of Section 1.420(g) of the Commission's Rules.

3. Accordingly, pursuant to the authority contained in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61, 0.204(b) and 0.283 of the Commission's Rules, IT IS ORDERED, That effective **January 10, 1992,** the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, IS AMENDED, with respect to the community listed below, to read as follows:

City	Channel No.
Derby Center, Vermont	221C3

4. IT IS FURTHER ORDERED, pursuant to Section 316(a) of the Communications Act of 1934, as amended, that the license of Steel Communications Company, Inc., for Station WMOO-FM, Derby Center, Vermont, IS MODIFIED to specify operation on Channel 221C3, in lieu of Channel 221A, subject to the following conditions:

(a) Within 90 days of the effective date of this *Order*, the licensee shall submit to the Commission a minor change application for a construction permit (Form 301).

(b) Upon grant of the construction permit, program tests may be conducted in accordance with Section 73.1620.

(c) Nothing contained herein shall be construed to authorize a change in transmitter location or to avoid the necessity of filing an environmental impact statement pursuant to Section 1.1301 of the Commission's Rules.

5. Pursuant to Commission Rule Section 1.1104(1)(k), and (2)(k), any party seeking a change of community of license of an FM or television allotment or an upgrade of an existing FM allotment, if the request is granted, must submit a rule making fee when filing its application to implement the change in community of license and/or upgrade. As a result of this proceeding, Steele Communications Company, Inc., licensee of Station WMOO-FM, is required to submit a rule making fee in addition to the fee required for the applications to effect the change in community of license and/or upgrade.

6. IT IS FURTHER ORDERED, That this proceeding IS TERMINATED.

7. For further information concerning this proceeding, contact Pamela Blumenthal, Mass Media Bureau, (202) 634-6530.

FEDERAL COMMUNICATIONS COMMISSION

Michael C. Ruger
Assistant Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

[1] The coordinates for Channel 221C3 at Derby Center are North Latitude 44-58-23 and West Longitude 72-04-30.

Before the
Federal Communications Commission
Washington, D.C. 20554

In re Request of

FLEET CALL, INC. File No. LMK-90036

For Waiver and Other Relief
To Permit Creation of Enhanced
Specialized Mobile Radio Systems
in Six Markets

MEMORANDUM OPINION AND ORDER

Adopted: October 31, 1991; Released: November 27, 1991

By the Commission:

1. By Memorandum Opinion and Order, *Fleet Call, Inc.*, 6 FCC Rcd 1533 (1991), we granted Fleet Call, Inc., limited relief to permit creation of wide-area digital Specialized Mobile Radio systems in six frequency congested markets. The National Association of Regulatory Utility Commissioners (NARUC) seeks reconsideration of that decision. Opposing pleadings raise both procedural and substantive objections to the NARUC filing.[1] and the National Association of Business and Educational Radio, Inc. For the reasons set forth below, we dismiss the NARUC petition on procedural grounds.

2. Section 1.106(b)(1) of our Rules, 47 C.F.R. 1.106(b)(1), provides in pertinent part that persons seeking reconsideration of a Commission action who are not already parties to the proceeding must show good reason for not participating at an earlier stage. NARUC did not file formal comments to the Fleet Call proposal and is thus not a party to this proceeding. It has not, further, justified participation on good cause grounds. We note initially in this regard that NARUC did, in the preliminary phases of the proceeding, file a statement in support of a request for extension of time to file comments. Not sufficient in itself to bestow party status, this statement clearly establishes that NARUC was aware of the proceeding from its outset and was familiar with the issues raised. Furthermore, NARUC was afforded an unusually generous period in which to prepare and submit comments. With two extensions of time, the filing period in the Fleet Call proceeding ultimately allowed 76 days for comments and 30 days for reply comments.[2] Clearly NARUC had both notice and opportunity for timely participation; nevertheless, it did not participate. As a final matter, we do not find the organizational problems cited by NARUC persuasive justification for its conduct. Small staffs, personnel changes and difficulties of coordination among member organizations are not so unique to NARUC as to warrant special treatment on these grounds.[3]

3. Accordingly, IT IS ORDERED, that the petition for reconsideration filed by the National Association of Regulatory Commissioners, IS DISMISSED.[4]

FEDERAL COMMUNICATIONS COMMISSION

Donna R. Searcy
Secretary

[1] NARUC's request is supported by Telephone and Data Systems, Inc. and opposed by Fleet Call, the American SMR Network Association, Inc.

[2] Orders, File No. LMK-90036, 5 FCC Rcd 3074 (1990); 5 FCC Rcd 3541 (1990).

[3] See, *e.g.*, Appendix A to NARUC's reply to oppositions.

[4] We note that nothing in NARUC's pleadings leads us to question our underlying public interest determination.

Before the
Federal Communications Commission
Washington, D.C. 20554

PUBLIC NOTICE

Released: November 27, 1991

PUERTO RICO TELEPHONE COMPANY FILES REVISION TO ITS COST ALLOCATION MANUAL

PUBLIC COMMENT INVITED

On November 4, 1991, The Puerto Rico Telephone Company (Puerto Rico) filed a proposed revision to its cost allocation manual (CAM) for the separation of regulated and nonregulated costs. Puerto Rico has amended its Affiliate Transaction Section to comply with the Common Carrier Bureau's efforts to further CAM uniformity among the carriers.

Parties may file comments on the proposed revision to the CAM no later than **December 23, 1991.** Replies should be filed by **January 7, 1992.** Comments should reference AAD 91-76. A copy of each pleading should be sent to Debbie Weber, FCC, Common Carrier Bureau, 2000 L St., N.W., Room 812, Washington, D.C. 20554 and the Downtown Copy Center (DCC), 1114 21st St., N.W., Washington, D.C. 20036, (202) 452-1422. Copies are available for public inspection and copying in the Accounting and Audits Division public reference room 2000 L St., N.W., Room 812, Washington, D.C. Copies are also available from DCC.

For further information contact Debbie Weber, (202) 634-1861.

FEDERAL COMMUNICATIONS COMMISSION

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

NATIONAL TELECOMMUNICATIONS
OF AUSTIN,
Complainant,

v. File No. E-88-71

SOUTHWESTERN BELL
TELEPHONE COMPANY,
Defendant.

ORDER

Adopted: November 20, 1991; Released: November 27, 1991

By the Chief, Enforcement Division, Common Carrier Bureau:

1. National Telecommunications of Austin (NTA) filed a formal complaint against Southwestern Bell Telephone Company (SWBT), alleging various violations of the Communications Act of 1934. NTA alleges SWBT has violated Section 201 by refusing to fill NTA orders for new lines, Section 202 by selective enforcement of certain policies, and Section 203 by failing to provide the required statutory notice of a change in policy. SWBT denies that its actions were unlawful.

2. The parties have conducted discussions aimed at settling the complaint. On November 14, 1991, NTA filed a motion seeking dismissal with prejudice of its complaint, advising the Commission that NTA and SWBT had reached a full and complete agreement of the issues in dispute in this matter.

3. We are satisfied that dismissal of the complaint will serve the public interest by eliminating the expenditure of further time and resources of the parties and of this Commission.

4. Accordingly, IT IS ORDERED, pursuant to Section 4(i) on the Communications Act of 1934, as amended, 47 U.S.C. 154(i), and authority delegated under 47 C.F.R. §0.291, that NTA's request for dismissal of the above-captioned complaint IS GRANTED.

5. IT IS FURTHER ORDERED that the above-captioned complaint IS DISMISSED WITH PREJUDICE and the proceeding IS TERMINATED.

FEDERAL COMMUNICATIONS COMMISSION

Mary Beth Richards
Chief, Enforcement Division
Common Carrier Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

WESTERN UNION CORPORATION, Complainant,	
v.	
SOUTHERN BELL TELEPHONE AND TELEGRAPH COMPANY,	File No. E-87-47S
SOUTHWESTERN BELL TELEPHONE COMPANY,	File No. E-87-49S
NEW YORK TELEPHONE COMPANY,	File No. E-87-51S
NORTHWESTERN BELL TELEPHONE COMPANY,	File No. E-87-52S
SOUTH CENTRAL BELL TELEPHONE COMPANY,	File No. E-87-53S
Defendants.	

ORDER

Adopted: November 19, 1991; Released: November 27, 1991

By the Chief, Enforcement Division, Common Carrier Bureau:

1. Western Union Corporation filed complaints against the above-captioned defendants seeking refunds of amounts billed by and paid to defendants for intrabuilding special access services between April 1, 1985, until such services were terminated. The Commission granted the complaints to the extent that they alleged that the intrabuilding services did not fall within the existing tariff provisions relied upon by defendants as the basis for billing. *Western Union Corporation v. Southern Bell Telephone and Telegraph Co.*, 5 FCC Rcd 4853 (1990). Pursuant to that order, Western Union filed the above-referenced supplemental complaints for damages.

2. Subsequently, on August 15, 1991, New Valley Corporation (formerly Western Union Corporation) filed a motion to dismiss these complaints with prejudice. It states that the parties have entered into settlement agreements which resolve all disputes in both the original and supplemental complaints.

3. We are satisfied that dismissal of these complaints will serve the public interest by eliminating the expenditure of further time and resources of the parties and of this Commission.

4. Accordingly, IT IS ORDERED, pursuant to authority delegated under 47 C.F.R. § 0.291, that the request for dismissal of the above-captioned complaints IS GRANTED.

5. IT IS FURTHER ORDERED that the above-referenced complaints ARE DISMISSED WITH PREJUDICE and the proceedings ARE TERMINATED.

FEDERAL COMMUNICATIONS COMMISSION

Mary Beth Richards
Chief, Enforcement Division
Common Carrier Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

PHONE AMERICA
OF CAROLINA, INC.,
Complainant,

v. File No. E-89-363

CONTEL OF
NORTH CAROLINA, INC.,
Defendant.

ORDER

Adopted: November 20, 1991; Released: November 27, 1991

By the Chief, Enforcement Division, Common Carrier Bureau:

1. On September 20, 1989, Phone America of Carolina, Inc. (hereinafter "Phone America") filed the above-captioned formal complaint against Contel of North Carolina, Inc. (hereinafter the "Defendant") seeking recovery of damages for Defendant's alleged overearnings on interstate access charges for the period January 1, 1987, through December 31, 1987. Phone America subsequently filed a motion for leave to withdraw the complaint without prejudice because the complaint is based on a one-year monitoring period rather than the two-year period established by the Commission.

2. We are satisfied that dismissal of the complaint will serve the public interest by eliminating the need for further litigation and the expenditure of further time and resources of the parties and of this Commission.

3. Accordingly, IT IS ORDERED, pursuant to the authority delegated by Section 0.291 of the Commission's Rules, 47 C.F.R. § 0.291, that Phone America's Motion for Leave to Withdraw Complaint IS GRANTED and that the above-captioned proceeding IS TERMINATED.

FEDERAL COMMUNICATIONS COMMISSION

Mary Beth Richards
Chief, Enforcement Division
Common Carrier Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

PHONE AMERICA
OF CAROLINA, INC.,
Complainant,

v. File No. E-89-364

ILLINOIS BELL
TELEPHONE COMPANY,
Defendant.

ORDER

Adopted: November 20, 1991; Released: November 27, 1991

By the Chief, Enforcement Division, Common Carrier Bureau:

1. On September 20, 1989, Phone America of Carolina, Inc. (hereinafter "Phone America") filed the above-captioned formal complaint against Illinois Bell Telephone Company (hereinafter the "Defendant") seeking recovery of damages for Defendant's alleged overearnings on interstate access charges for the period January 1, 1987, through December 31, 1987. Phone America subsequently filed a motion for leave to withdraw the complaint without prejudice because the complaint is based on a one-year monitoring period rather than the two-year period established by the Commission.

2. We are satisfied that dismissal of the complaint will serve the public interest by eliminating the need for further litigation and the expenditure of further time and resources of the parties and of this Commission.

3. Accordingly, IT IS ORDERED, pursuant to the authority delegated by Section 0.291 of the Commission's Rules, 47 C.F.R. § 0.291, that Phone America's Motion for Leave to Withdraw Complaint IS GRANTED and that the above-captioned proceeding IS TERMINATED.

FEDERAL COMMUNICATIONS COMMISSION

Mary Beth Richards
Chief, Enforcement Division
Common Carrier Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 90-207

In re Applications of

RADIO REPRESENTATIVES, INC. File No. BPH-880620MB

IRENE ESCALANTE File No. BPH-880623MO

For Construction Permit for
New FM Station, Channel 239B1,
Orcutt, California

ORDER

Adopted: November 12, 1991; Released: November 27, 1991

By the Commission:

1. In a *Memorandum Opinion and Order*, FCC 91M-04, released January 4, 1991, Administrative Law Judge John M. Frysiak (ALJ) dismissed Irene Escalante's application for failing to demonstrate timely that she was financially qualified to construct and operate her proposed station. In a subsequent ruling, *Memorandum Opinion and Order*, FCC 91M-504, released February 8, 1991, the ALJ denied Escalante's request to intervene in the proceeding. The Review Board affirmed both of the ALJ's rulings. *Radio Representatives, Inc.*, 6 FCC Rcd 2015 (1991). Having thoroughly reviewed the record, the ALJ's rulings and the Board's decision, and the arguments in the pleadings now before us,[1] we agree with the Board's decision and it is affirmed.

2. There are, however, certain matters raised in Escalante's applications for review that warrant brief comment. Escalante contends that the Board's affirmance of the ALJ's dismissal of her application because she failed to amend timely to establish her financial qualifications cannot be reconciled with *South Florida Broadcasting Co., Inc.*, 94 FCC 2d 452 (1983). Escalante reads that case to hold that applicants against whom financial issues are specified can show by evidence presented at hearing that they are financially qualified. We disagree with that reading of *South Florida*. As we explained in *Carol Sue Bowman*, 6 FCC Rcd 4723 (1991), the Commission in *South Florida* merely held that applicants cannot amend insufficient financial proposals in their pending applications and, thus, avoid the designation of financial issues simply by recertifying that they are financially qualified without submitting supporting documentation. The Commission's holding in *South Florida* does not stand for the proposition that applicants against whom financial issues are specified have an absolute right to demonstrate at hearing that they are financially qualified. Hence, *South Florida* is inapposite. As the Board pointed out, the controlling precedent is *Aspen FM, Inc.*, 6 FCC Rcd 1602, 1603 ¶ 11 (1991), which held that it was error for an ALJ at hearing to consider a new financial proposal in the absence of a petition for leave to amend supported by a good cause showing in accordance with 47 C.F.R. § 73.3522(b). Because Escalante did not file the requisite documentation to establish her financial qualifications together with a good cause showing, the rulings below are correct.

3. Escalante also contends that she is the victim of "vagaries of the Commission's processing rules," citing *Scioto Broadcasters, Limited Partnership*, 6 FCC Rcd 1893 (1991), which accepted a fully documented financial amendment filed as of right within 30 days of the designation order pursuant to 47 C.F.R. § 73.3522(b)(2). Escalante asserts that she submitted a curative financial amendment before the issuance of the designation order in this case, which was prior to the period when she claims that she could have amended her application as of right, but that she has nevertheless been held not to have acted with due diligence to establish her financial qualifications. However, the predesignation order amendment submitted by Escalante merely sought to modify her previous negative financial certification by checking the "yes" box in Section III of her application without providing any supporting documentation. As we have already stated, an applicant may not avoid a financial issue simply by recertifying without submitting supporting documentation. *Carol Sue Bowman*, 6 FCC Rcd 4723 ¶ 3. Moreover, because Escalante abandoned the financial proposal upon which that purported amendment was based, whether she acted with due diligence in filing such an amendment is of no consequence. The due diligence question resolved adversely to Escalante in this proceeding was in connection with her subsequently filed financial amendment, which was based upon a new financial proposal and which was also equally deficient in that no supporting documentation was submitted.

4. Furthermore, to the extent that Escalante contends that she was entitled to participate in this proceeding after the dismissal of her application because she is a resident in the community to be served by the station, we find no merit to such a contention. The Commission has held that it is not required to extend standing to former parties in new applicant proceedings merely on the ground that they are private individuals residing in the community to be served by the station. *See Kenneth J. Crosthwait*, 79 FCC 2d 191, 194-195 ¶ 5 (1980).

5. ACCORDINGLY, IT IS ORDERED, That the Motion to Strike Applications for Review filed June 3, 1991, by Radio Representatives, Inc. IS DENIED.

6. IT IS FURTHER ORDERED, That the Motion for Leave to File Supplement to Opposition to Application for Review filed August 9, 1991, by Radio Representatives, Inc. IS GRANTED and the accompanying Supplement IS ACCEPTED.

7. IT IS FURTHER ORDERED, That the Motion for Leave to File Supplement to Contingent Application for Review filed August 19, 1991, by Irene Escalante IS GRANTED and the accompanying Supplement IS ACCEPTED.

8. IT IS FURTHER ORDERED, That the Motion to Strike and Contingent Opposition filed August 19, 1991, by Irene Escalante IS DISMISSED as moot.

9. IT IS FURTHER ORDERED, That the request to file Supplement to Application for Review filed October 10, 1991, by Escalante IS GRANTED and its Supplement IS ACCEPTED.

10. IT IS FURTHER ORDERED, THAT pursuant to 47 C.F.R. § 1.115(g) the Application for Review (as supplemented on October 10, 1991) and Contingent Application for Review (as supplemented on August 19, 1991) both filed May 20, 1991, by Irene Escalante ARE DENIED.

FEDERAL COMMUNICATIONS COMMISSION

Donna R. Searcy
Secretary

FOOTNOTE

[1] Application for Review and Contingent Application for Review both filed May 20, 1991, by Escalante; an Erratum to the Contingent Application for Review filed May 22, 1991, by Escalante; a Motion to Strike Applications for Review filed June 3, 1991, by Radio Representatives, Inc. (Radio); Oppositions to Applications for Review filed June 4, 1991, by Radio; Opposition to Motion to Strike filed June 6, 1991, by Escalante; Supplement to Motion to Strike filed June 25, 1991, by Radio; Motion for Leave to File Supplement to Opposition to Application for Review and Suplement filed August 9, 1991, by Radio; Motion for Leave to File Supplement to Contingent Application for Review and Supplement filed August 19, 1991, by Escalante; Motion to Strike and Contingent Opposition filed August 19, 1991, by Escalante; Opposition to Motion for Leave to File Supplement to Contingent Application for Review filed August 26, 1991, by Radio; Opposition to Motion to Strike filed August 28, 1991, by Escalante; Supplement to Application for Review filed October 10, 1991, by Escalante; and Opposition to Supplement filed October 19, 1991, by Radio. We will deny Radio's motion to strike. Inasmuch as Escalante is seeking review of a Board decision affirming two rulings by the ALJ, each denying her the right to participate in the proceeding and both appealed separately to the Board, we reject Radio's contention that Escalante is seeking review of a single interlocutory action taken by the Board and is thus precluded under 47 C.F.R. § 1.115 from filing two ten page applications for review.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 90-273

In re Applications of

WILLIAM E. BENNS, IV	File No. BPH-880519MZ
STANTON BROADCASTING CORPORATION	File No. BPH-880519NX
DOBSON BROADCASTING CO.	File No. BPH-880519OH

For Construction Permit
for New FM Station,
Channel 290A
Trussville, Alabama

ORDER

Adopted: November 14, 1991; Released: November 27, 1991

By the Commission:

1. Before the Commission for consideration are a Decision, *William E. Benns, IV*, 6 FCC Rcd 2322 (Rev. Bd. 1991), an "Appeal from Order of Dismissal" filed on May 24, 1991 by Lawson Communications, Inc., and Oppositions filed by the Mass Media Bureau and Stanton Broadcasting Corporation on June 3, 1991. We agree with the Board's resolution of this case and we therefore adopt its decision.

2. ACCORDINGLY, IT IS ORDERED, That pursuant to 47 C.F.R. § 1.115(g), the "Appeal from Order of Dismissal" filed on May 24, 1991 by Lawson Communications, Inc., IS DENIED.

FEDERAL COMMUNICATIONS COMMISSION

Donna R. Searcy
Secretary

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 88-21

In re Applications of

FRESNO FM LIMITED PARTNERSHIP	File No. BPH-861230MB
JOHN MARSHALL HOOKER d/b/a JMH BROADCASTING	File No. BPH-861230ME
JOHN EDWARD OSTLUND	File No. BPH-861231MD
VALLEY RADIO, LTD., A CALIFORNIA LIMITED PARTNERSHIP	File No. BPH-861231ME
LAURA H. NORMAN	File No. BPH-861231MI

For Construction Permit for
a New FM Station on Channel
257A, Fresno, California

MEMORANDUM OPINION AND ORDER

Adopted: November 18, 1991; Released: November 27, 1991

By the Commission:

I. INTRODUCTION

1. Before the Commission are a decision and a related memorandum opinion and order by the Review Board granting the application of Laura H. Norman for a new FM radio station in Fresno, California, and denying the mutually exclusive applications of Fresno FM Limited Partnership, John Edward Ostlund, and Valley Radio, Ltd. *Fresno FM Limited Partnership*, 6 FCC Rcd 1570 (Rev. Bd. 1991); *Carta Corp.*, 5 FCC Rcd 3696 (Rev. Bd. 1990). *See also Carta Corp.*, 4 FCC Rcd 7973 (I.D. 1989). The losing parties seek review of the Board's actions.[1] We find that the Board gave insufficient credit to both the quantitative and qualitative aspects of Ostlund's proposal for the integration of ownership into management and that Ostlund's credit is dispositive in this case. Moreover, we find it appropriate to comment on the Board's decision in another respect, although we agree with the Board's resolution of the pertinent issue.

II. BACKGROUND

2. In this proceeding, the Board reversed an initial decision by Administrative Law Judge Joseph Chachkin and held that Norman had a decisive preference for integration of ownership and management over Ostlund, Fresno FM, and Valley. The Board credited Norman with 100 percent full-time integration and held that the qualitative attributes of her proposal were superior to those of Ostlund's, even if Ostlund were also given 100 percent credit.[2] Reversing the ALJ, the Board denied Fresno FM any integration credit, because the Board considered Fresno FM's ownership structure unreliable. Valley claimed only 15 percent integration credit.

III. DISCUSSION

3. As the Board concluded, the outcome of this case turns on the integration credit due the respective applicants. Initially, we wish to address the Board's rejection of Fresno FM's integration proposal. This proposal implicates our continuing concern over the reliability of applicants' integration proposals, recently restated in *Royce International Broadcasting*, 5 FCC Rcd 7063, 7063-64 ¶¶ 4-10 (1990), *recon. denied*, 6 FCC Rcd 2601 (1991). We therefore believe that it is useful for us to comment on our reasons for agreeing with the Board's resolution of this issue. We will then address Ostlund's integration proposal, as to which we disagree with the Board's analysis.

4. *Fresno FM*. Fresno FM is a limited partnership consisting of one general partner, Jesus Cruz, and three limited partners, Ray Stanfield, Frederick R.L. Osborne, and MR Associates (a partnership between Richard Rynd and Melvin Steinberg). 4 FCC Rcd at 7974 ¶ 10. Cruz holds a 15 percent equity interest in Fresno FM and proposes to serve as the station's full-time general manager, for which Fresno FM claims 100 percent integration credit. *Id.* at 7975 ¶ 19. We agree with the Board, however, that Cruz cannot be relied on to control Fresno FM and that the claim of integration credit should therefore be rejected. 5 FCC Rcd at 3702 ¶ 18.[3]

5. The record concerning Fresno FM discloses circumstances that raise questions about the reliability of the applicant's ownership structure.[4] Cruz became a general partner in a relatively casual way. He was accepted as general partner shortly before the filing of the application without a thorough investigation of his character, business, and financial qualifications.[5] For his part, Cruz undertook the unlimited liability of a general partner without negotiating his ownership share or the terms of the limited partnership agreement (4 FCC Rcd at 7974-75 ¶¶ 13-14) and without investigating the limited partners. In particular, at the time Cruz agreed to become a general partner, he had not seen any detailed financial information about the limited partners and did not know how much money they were willing to invest. Tr. 293, 440-42. Cruz contributed no capital to Fresno FM and was uncertain as to the extent of his personal liability. 5 FCC Rcd at 3697 ¶ 8.

6. We note the similarity between Cruz' integration proposal and those deemed unworthy of credence in *Poughkeepsie Broadcasting Limited*, 6 FCC Rcd 2497 (1991), *appeal pending sub nom. Poughkeepsie Communications Limited Partnership v. FCC*, No. 91-1271 (D.C. Cir. file June 5, 1991) and *Metroplex Communications, Inc.*, 5 FCC Rcd 5610 (1990), *appeal pending sub nom. Southeast*

Florida Broadcasting Ltd. v. FCC, No. 90-1482 (D.C. Cir. filed Oct. 10, 1990). *See also Evergreen Broadcasting Co.*, 6 FCC Rcd_____ ¶¶ 18-23. *Compare Doylan Forney*, 5 FCC Rcd 5423, 5427 ¶ 26 (1990). As in this case, the limited partnerships discredited in those cases were formed in a relatively casual manner by virtual strangers, who made little effort to investigate each other's backgrounds, their rights and obligations under the agreement, or the specifics of the proposal before entering into the agreement. *Poughkeepsie*, 6 FCC Rcd at 2498 ¶ 6; *Metroplex*, 5 FCC Rcd at 5612 ¶ 14.[6] *See generally Evergreen*, 6 FCC Rcd_____ ¶ 12.

7. Moreover, the record in this case contains an additional factor that we find telling in evaluating the reliability of Cruz' claimed participation. Cruz' testimony concerning his involvement with Fresno FM contains numerous contradictions. These discrepancies undermine the credibility of his claim to be a genuine general partner and persuade us not to rely on the representation that Cruz would control Fresno FM. *See Metroplex*, 5 FCC Rcd at 5612 ¶¶ 20-21. The scope of this testimony included the extent of Cruz' personal liability, Cruz' relationship with Fresno FM's attorney, and Cruz' salary as general manager. *Compare* (1) tr. 268-69, 472 (Cruz would be liable for the partnership's debts) *with* tr. 273, 325, 473 (Cruz would not be liable); (2) tr. 191 (Stanfield told Cruz that Cohen would be counsel for the applicant) *with* tr. 480, 496 (Stanfield did not tell Cruz that Cohen would be counsel for the applicant); (3) tr. 226-27 (Cruz prepared a budget for the applicant) *with* tr. 228-29 (Cruz did not prepare a budget); (4) tr. 217 (Cruz asked others what his salary as general manager might be) *with* tr. 217-18 (Cruz did not discuss with anyone the amount of his salary);[7] and (5) tr. 207 (Cruz and Cohen "put together draft" of the limited partnership agreement, suggesting that Cruz was involved in drafting the limited partnership agreement) *with* tr. 210-11 (Cruz and Cohen filled in the blanks of an already existing draft limited partnership agreement). In view of the foregoing, we agree with the Board that Fresno FM has not established the reliability of Cruz' claimed nominal status as general partner. The persistent contradictions we observed in the representations made about Cruz' participation in the applicant's affairs -- especially when viewed in conjunction with the other factors casting doubt on the validity of Fresno FM's proposal -- are too grave to warrant crediting Cruz' proposed integration. *See Royce*, 5 FCC Rcd at 7064 ¶ 10.[8]

8. *Ostlund*. Ostlund is a sole proprietor who proposes to serve as the station's full-time general manager. 4 FCC Rcd at 7980 ¶¶ 84, 86. The Board found that the qualitative aspects of Ostlund's proposed integration were inferior to those of Norman. The Board found that Norman and Ostlund were entitled to equivalent credit for local residence and that Norman's female credit was therefore dispositive. 6 FCC Rcd at 1573 ¶ 18. Therefore, the Board concluded that Ostlund would not prevail, even if he received the 100 percent full-time quantitative integration credit he claimed. 6 FCC Rcd at 1573 ¶ 18.[9] Nonetheless, the Board noted that there was a substantial question as to whether Ostlund could be relied upon to fulfill his full-time integration proposal. *Id.* at 1573 ¶ 17.

9. Our review of the record indicates that the Board understated the qualitative merit of Ostlund's integration in relation to Norman's proposal. Contrary to the Board's ruling, we find that Ostlund is entitled to a preference over Norman for local residence. Norman has ten years residence in Fresno (interrupted by an eight month period) that is not enhanced by significant civic participation. 4 FCC Rcd at 7982 ¶¶ 102-03, 7986 ¶ 131. Ostlund has 14 years local residence, including six years in Fresno and eight years in an unincorporated area completely within the boundaries of Fresno. *Id.* at 7981 ¶ 88. *See Joe L. Aldridge*, 6 FCC Rcd 994, 995 ¶ 6 (Rev. Bd. 1991) (local residence credit given for residence in a community continguous to the community of license). Moreover, Ostlund's longer local residence is also significantly enhanced by civic activities. 4 FCC Rcd at 7981 ¶¶ 89-90. Ostlund's overall local residence credit is therefore superior to Norman's. *See Ronald Sorenson*, 6 FCC Rcd 1952, 1952-53 ¶ 5 (1991). Additionally, Ostlund, unlike Norman, receives credit for broadcast experience. 4 FCC Rcd at 7981 ¶ 91.

10. Although Norman is entitled to credit for her female status, this is insufficient to overcome Ostlund's local residence advantage. Local residence has greater comparative significance than gender. *See Radio Jonesboro, Inc.*, 100 FCC 2d 941, 945 ¶ 8 (1985) (minority ownership and local residence have equal significance); *Horne Industries, Inc.*, 98 FCC 2d 601, 602-03 ¶ 4 (1984) (minority ownership-participation has more significance than female ownership-participation). Thus, considered in its qualitative aspects, Ostlund's integration proposal is superior to Norman's.

11. In view of the foregoing, the question of whether Ostlund, like Norman, is entitled to 100 percent quantitative credit -- which the Board did not reach -- becomes crucial. While claiming that he will serve as the proposed station's general manager, Ostlund also proposes to retain his ownership of Jeffrey/Scott Advertising, Inc., a Fresno advertising agency. 4 FCC Rcd at 7980-81 ¶ 87. Ostlund currently manages Jeffrey/Scott on a full-time basis. He asserts that he can reduce his present full-time involvement with Jeffrey/Scott by assigning his day-to-day responsiblities to employees, including the agency's present business manager, creative director, and accounts supervisor. Ostlund details the day-to-day responsibilities he will transfer to each individual in his direct case. He states:

> My duties on the administrative side will be handled by our present Business Manager, who will make decisions about client-agency relationships, handle employee relationships within the agency, and otherwise oversee the agency's general operations. The creative aspect of the agency's business will be supervised by our current Creative Director, who will sign-off on creative work that needs to be evaluated and proofread, as I do now. In addition, our present Account Supervisor will take over the few accounts which I personally have maintained, and our Account Assistant will continue to process media insertion orders as she does at present, but without my participation.

Ostlund Exh. 1 at 4. According to Ostlund, each of the individuals involved is an experienced employee, and collectively they "basically, run the company now." Tr. 754. By transferring responsibility in this manner, Ostlund claims that he can reduce his participation with the agency to no more than five hours a week. He proposes to use this time to meet with the individuals he places in charge of the agency's operation twice a week to

receive department reports and to review both the status of accounts and the agency's creative product, income, and expenses. Ostlund Exh. 1 at 4-5. Ostlund characterized his future role with the agency as "generally overseeing its operations and insuring that they continue to run smoothly." *Id.*

12. The ALJ, after hearing Ostlund testify under cross examination held that:

> . . . Ostlund has shown in convincing detail that he can reduce his time commitment to Jeffrey-Scott so that it will not interfere with his ability to meet his commitment to manage his station on a full-time basis. In the absence of evidence impeaching his express representations, Ostlund must be accorded credit for his integration proposal.

4 FCC Rcd at 7986 ¶ 129.

13. Ostlund has provided specific and credible evidence of his respective time commitments and how he will accommodate his outside business interests with his integration proposal. *See Bradley, Hand, and Triplett*, 89 FCC 2d 657, 660 ¶ 4 (Rev. Bd. 1982). He has described with particularity the duties he currently performs at the advertising agency and how those duties will be accomplished in his absence. The ALJ, who observed Ostlund's testimony under cross examination, found Ostlund's assertions in this regard credible. We therefore award Ostlund 100 percent full-time integration credit. *See Joe L. Aldridge*, 6 FCC Rcd 994, 994 ¶ 3 (Rev. Bd. 1991); *Central Texas Broadcasting Co.*, 90 FCC 2d 583, 585-89 ¶¶ 5-14 (Rev. Bd. 1982). In light of Ostlund's entitlement to 100 percent quantitative credit, his qualitative advantages make him the preferred applicant in this proceeding.

IV. ORDERS

14. ACCORDINGLY, IT IS ORDERED, That the Motion to Strike filed May 15, 1991 by Fresno FM Limited Partnership IS GRANTED to the extent indicated and otherwise IS DENIED.

15. IT IS FURTHER ORDERED, That, pursuant to 47 C.F.R. § 1.115(g), the Applications for Review filed April 18, 1991 by Fresno FM Limited Partnership and John Edward Ostlund and April 19, 1991 by Valley Radio Ltd. ARE GRANTED to the extent indicated and otherwise ARE DENIED.

16. IT IS FURTHER ORDERED, That the decision of the Review Board, FCC 91R-23 (Mar. 19, 1991) (6 FCC Rcd 1570) IS MODIFIED as set forth above.

17. IT IS FURTHER ORDERED, That the application of John Edward Ostlund (File No. BPH-861231MD) IS GRANTED and the applications of Fresno FM Limited Partnership (File No. BPH-861230MB), Valley Radio, Ltd., a California Limited Partnership (File No. 861231ME), and Laura H. Norman (File No. BPH-861231MI) ARE DENIED.

FEDERAL COMMUNICATIONS COMMISSION

Donna R. Searcy
Secretary

FOOTNOTES

[1] Now pending before the Commission are: (1) Applications for Review filed April 18, 1991 by Fresno FM and Ostlund and April 19, 1991 by Valley, and oppositions filed May 3, 1991 by Norman and Ostlund; (2) supplements to their applications for review filed May 9, 1991 and August 7, 1991 by Norman and May 10, 1991 by Ostlund and responses filed May 20, 1991 and August 16, 1991 by Fresno FM; and (3) a Motion to Strike filed May 15, 1991 by Fresno FM, and oppositions filed May 17, 1991 by Norman and May 20, 1991 by Ostlund. An additional applicant, JMH Broadcasting (File No. BPH-861230ME), did not file an application for review and thus the Board's denial of its application is final.

[2] Because the Board found that Ostlund would lose in any event, it did not reach Ostlund's contention that the slight demerit imposed against him by the ALJ for diversification of media control was contrary to Commission policy. *See* 6 FCC Rcd at 1574 n.18; 4 FCC Rcd at 7984 ¶ 121. Ostlund owns Jeffrey/Scott Advertising, Inc., a local advertising agency. 4 FCC Rcd at 7980 ¶ 84. Although an advertising agency is not a medium of mass communications, the Commission formerly considered the common ownership of a broadcast station and an advertising agency relevant to the diversification criterion because of the potential for conflicting interests. *See, e.g., Berryville Broadcasting Co.*, 70 FCC 2d 1, 15 ¶ 23 (Rev. Bd. 1978). More recently, however, the Commission found that changed circumstances had alleviated concerns about conflicts stemming from such cross-interests. *Reexamination of the Commission's Cross-Interest Policy*, 4 FCC Rcd 2208, 2213-14 ¶ 36 (1989). In light of that determination, there is no longer any basis pertinent to the diversification criterion for consideration of an ownership interest in an advertising agency. Accordingly, Ostlund receives no diversification demerit.

[3] In its motion to strike, Fresno FM claims that pleadings by Ostlund and Norman contain the offensive and irrelevant allegation that Fresno's attorney Lewis Cohen (and Stanfield) are in the practice of setting up defective limited partnerships. To the extent that language in these pleadings suggests that these individuals' involvement in prior applications is relevant in determining Fresno FM's bona fides, we agree that it is improper. *See* Fed. R. Evid. 404. *See also Loughan v. Firestone Tire and Rubber Co.*, 749 F.2d 1519, 1524 (11th Cir. 1985) (distinguishing admissible habit evidence from inadmissible character evidence). Accordingly, to avoid any appearance of prejudice, we will strike footnote 6 of Ostlund's Opposition to Fresno FM Limited Partnership's Application for Review and the sentence on page 3 of Norman's Opposition to Application for Review beginning "Indeed, Mr. Cohen's pivotal role. . ." To the extent that Norman merely suggests that Fresno FM shares features with previous limited partnerships found to be unreliable, the language is proper. We therefore will not strike the balance of the paragraph containing the offensive sentence.

[4] In accordance with the parties' suggestion in their supplemental pleadings, which we hereby accept, we have considered the relevance to this proceeding of cases decided after the filing of the applications for review.

[5] Stanfield, who recruited Cruz, testified that he based his decision to enter into a partnership with Cruz on a conversation with Cruz' employer, Cruz' resume, and a single 60-90 minute meeting with Cruz eight days before the application was filed. Tr. 535-36, 571-72. *See* 4 FCC Rcd at 7974 ¶¶ 11-14. Cruz' own testimony does not support Stanfield's claim that he received a copy of Cruz' resume. Tr. 203-04.

[6] Cruz' unfamiliarity with the details of Fresno FM's application stemmed in part from his reliance on communications counsel (5 FCC Rcd at 3697-99 ¶¶ 8-11). We note that a nominal owner's reliance on a hired expert (*e.g.* an attorney, an engineer or a site locator) may, as in this case, be consistent with a finding, based on the record as a whole, that he will not exercise exclusive control over the applicant, particularly if the expert was associated with the passive owners before the nominally active owner became involved. However, such reliance does not by itself undermine the reliability of an otherwise credible proposal, since even a *bona fide* owner might have reason to depend heavily on expert advice. In other words, where the record as a whole demonstrates the overall reliability of the stated ownership structure, the owner's reliance on experts does not independently give rise to concern. *See Susan M. Mulkey*, 4 FCC Rcd 5520, 5521 ¶¶ 7-8 (1989) (fully crediting the integration proposal of a 10 percent voting stockholder where (1) she relied on counsel in selecting the applicant's ownership structure but had a major role in prosecuting the application; (2) she elected to acquire a 10 percent equity share after discussing with the 90 percent non-voting stockholder a comfortable level of financial commitment on her part; and (3) she borrowed money from the non-voting stockholder to finance her stock but signed a promissory note requiring repayment in five years even if she was not the successful applicant).

[7] Additionally, *compare* tr. 221-22 *with* tr. 225-26 (as to whether Cruz was ever specifically told what remuneration a general manager typically receives.)

[8] Without any comparative credit for its integration proposal and a diversification demerit due to the media interests of its limited partners, Fresno FM cannot prevail on the comparative issue. Therefore, we need not determine whether the contradictions in Cruz' testimony raise substantial and material questions of fact that would require the addition of financial and misrepresentation/candor issues against Fresno FM. *Carta Corporation*, 5 FCC Rcd at 3700-01 ¶ 13 & n.10. *See Royce*, 5 FCC Rcd at 7064-65 n.6., *citing Mid-Ohio Communications, Inc.*, 5 FCC Rcd 940 (1990), *recon. denied*, 5 FCC Rcd 4597 (1990).

[9] Both Norman and Ostlund are entitled to credit for proposing the use of auxiliary power equipment. 4 FCC Rcd at 7981 ¶ 92, 7982 ¶ 105. We find no significance to the differences in the type of equipment proposed. *See Comparative Broadcast Hearings*, 2 FCC 2d 667 (1966).

Before the
Federal Communications Commission
Washington, D.C. 20554

In re

THE HINTON TELEPHONE COMPANY OF HINTON, OKLAHOMA, INC.

File No. 63500-92-1-BFW

Notice of Apparent Liability for Forfeiture Penalty for Station WQZ687 in the Public Land Mobile Service at Colony, Oklahoma

NOTICE OF APPARENT LIABILITY FOR FORFEITURE

Adopted: November 21, 1991; Released: November 27, 1991

By the Chief, Mobile Services Division:

1. On February 26, 1988, a stock reorganization took place which resulted in a *pro forma* transfer of control of The Hinton Telephone Company of Hinton, Oklahoma, Inc. (Hinton) from John R. Hollis to John R. Hollis 1988 Revocable Trust, John R. Hollis, Trustee.[1] At that time, Commission approval of the *pro forma* transfer of control was neither sought nor given. On April 6, 1989, the Commission granted renewal authority to Hinton to operate a facility for Station WQZ687 on frequency 454.625 at Colony, Oklahoma. On August 23, 1991, Hinton filed an application (FCC For 490) for Commission consent to the *pro forma* transfer of control of Hinton. Hinton states that the parties to the *pro forma* transfer did not realize that it was necessary to obtain prior consent for the *pro forma* transfer and upon learning of the requirement, Mr. Hollis requested counsel to prepare the necessary application for compliance.

2. Section 310(d) of the Communications Act provides in relevant part:

> No construction permit or station license, or any rights thereunder, shall be transferred, assigned, or disposed of in any manner, voluntarily or involuntarily, directly or indirectly, or by transfer of control of any corporation holding such permit or license, to any person except upon application to the Commission and upon finding by the Commission that the public interest, convenience, and necessity will be served thereby.

Similarly, Section 22.39(a) of the Commisison's rules states:

> *Approval required.* Authorizations shall be transferred or assigned to another party, voluntarily (for example, by contract) or involuntarily (for example, by death, bankruptcy, or legal disability), directly or indirectly or by transfer of control of any corporation holding such authorization, only upon application and approval by the Commission.

The February 26, 1988 stock reorganization constituted an unauthorized *pro forma* transfer of control. Consequently, an apparent violation of Section 310(d) of the Communications Act and Section 22.39(a) of the Commission's rules has occurred based upon the unauthorized *pro forma* transfer of control.

3. Section 503(b) of the Communications Act states in pertinent part:

> Any person who is determined by the Commision, in accordance with paragraph (3) or (4) of this subsection, to have--
>
> (B) willfully or repeatedly failed to comply with any of the provisions of this chapter or if any rule, regulation, or order issued by the Commission under this chapter . . . shall be liable to the United States for a forfeiture penalty.

We find that the unauthorized *pro forma* transfer of control of Hinton constitutes willful and repeated conduct within the term of the statute.

4. Pursuant to the Commission's *Policy Statement, Standards for Assessing Forfeitures*, 6 FCC Rcd 4695 (1991), 56 Fed. Reg. 37665 (1991), *recon. pending*, the base forfeiture amount for an unauthorized *pro forma* transfer of control is $10,000. Consistent with this *Policy Statement*, we are adjusting the forfeiture downward to $7,000 because Hinton voluntarily disclosed the unauthorized *pro forma* transfer of control.

5. Accordingly, pursuant to Section 503(b) of the Communications Act of 1934, as amended, 47 U.S.C. Sec. 503(b) and Section 1.80 of the Commission's rules, 47 C.F.C. Sec. 1.80, IT IS ORDERED that The Hinton Telephone Company of Hinton, Oklahoma, Inc. IS APPARENTLY LIABLE FOR A FORFEITURE in the amount of Seven Thousand Dollars ($7,000) for willful and repeated violations of the aforementioned statutory and rule provisions from February 26, 1988. The amount specified was determined after consideration of the factors set forth in Section 503(b)(2) of the Communications Act of 1934, as amended.

6. Payment of the forfeiture may be made by mailing a check or similar instrument to the Commission within thirty (30) days of the release date of this order, payable to the order of the Federal Communications Commission, at: Federal Communications Commission, P.O. Box 73482, Chicago, IL 60673-7482.

FEDERAL COMMUNICATIONS COMMISSION

Gregory J. Vogt
Chief, Mobile Services Division
Common Carrier Bureau

FOOTNOTE

[1] Trust agreements were executed by both Mr. Hollis and his wife, resulting in establishment of two trusts to which Mr. and Mrs. Hollis transferred their stock. Prior to the *pro forma* transfer of control, Mr. Hollis held 99 percent of Hinton's issued and outstanding stock. After the *pro forma* transfer, Mr. Hollis was entitled to vote 91.3 percent of Hinton's stock as trustee and maintained control of Hinton pursuant to the trust agreement.

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

Vista-United Telecommunications — Transmittal No. 5

Revisions to Tariff F.C.C. No. 1

ORDER

Adopted: November 18, 1991; Released: November 18, 1991

By the Chief, Common Carrier Bureau:

1. On August 21, 1991, Vista-United Telecommunications (Vista) filed Transmittal No. 5 to adjust its switched access local switching and local transport recurring rates. Specifically, Vista would increase its revenue requirement for local switching by $548,000 and decrease its revenue requirement for local transport by $136,000, resulting in a net switched access revenue requirement increase of $412,000. Description and Justification at 1. The tariff is scheduled to become effective on November 19, 1991.

2. On September 5, 1991, MCI Telecommunications (MCI) filed a petition to reject, or in the alternative, to suspend and investigate Transmittal 5. MCI asserts that Vista did not supply sufficient cost data required by Section § 61.38 of the Commission's Rules, 47 C.F.R. 61.38(b), to justify this 16 percent increase over Vista's current switched access revenue requirement. MCI Petition at 2-3. MCI also contends that Vista failed to demonstrate that its present rates will cause it to underearn. *Id.* at 3-4. Finally, MCI argues that Transmittal 5 is a mid-course correction which should be rejected because it presents piecemeal information that results in increased rates. According to MCI, absent from Vista's filing is more complete information that might result in lower rates. *Id.* at 4-5.

3. Vista responds that it erroneously cited Section 61.38(b) in its transmittal. According to Vista, it is actually subject to Section 61.39 of the Rules, 47 C.F.R. § 61.39, under which supporting data need not be filed with the tariff transmittal. Vista Reply at 1. Vista further responds that there is no requirement that it show it will underearn when filing for a rate increase. *Id.* at 2-3. Finally, Vista argues that Transmittal 5 is not a midcourse correction, merely for its benefit, but rather a necessary adjustment reflecting actual historical costs. It asserts that these new data were not available for its April 2, 1991 tariff filing, nor could Vista have reasonably produced the cost information at that time. *Id.* at 3-4.

4. The Common Carrier Bureau has reviewed Vista's Transmittal 5, the petition filed by MCI, and Vista's reply to that petition. We conclude that no compelling argument has been presented that the tariff is so patently unlawful as to warrant rejection, or that an investigation is warranted at this time.

5. Accordingly, IT IS ORDERED that the petition to reject or suspend and investigate Vista-United Telecommunications Tariff F.C.C. No. 1, Transmittal No. 5, filed by MCI Telecommunications, IS DENIED.

FEDERAL COMMUNICATIONS COMMISSION

Richard M. Firestone
Chief, Common Carrier Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

CC Docket No. 90-11

In the Matter of

AT&T COMMUNICATIONS

Tariff F.C.C. No. 15 Transmittal No. 1854
Competitive Pricing Plan No. 2
Resort Condominiums International

MEMORANDUM OPINION AND ORDER

Adopted: October 15, 1991; Released: October 16, 1991

By the Commission:

1. AT&T Communications (AT&T) seeks a stay[1] of a recent Commission Order[2] which held that AT&T's second Tariff 15 plan is unlawful. AT&T seeks the stay only if a recently filed Tariff 15 revision (Transmittal 3498) does not become effective by October 16, 1991, which is the date the Commission ordered for filing tariff revisions removing CPP2. Specifically, AT&T states that if the revisions in Transmittal 3498 are not permitted to become effective by that date, then AT&T would like the Commission to stay the *Tariff 15 Rejection Order* pending review of that Order by the United States Court of Appeals. AT&T Application at 4, n.2. and 9-10. MCI Telecommunications Inc. (MCI) filed an opposition to this application for stay.[3] We deny AT&T's application for the reasons discussed below.

2. AT&T contends that its application for stay should be granted because its request satisfies the Commission's standard for grant of a stay. This standard, adapted from *Virginia Petroleum Jobbers Association v. Federal Power Commission*,[4] establishes a four-pronged test for determining whether a stay is warranted. The fourth prong of that test focuses on whether a stay request is in the public interest.[5] AT&T argues that the public interest is served by a grant of its application because a stay would maintain the status quo, foster competition and prevent injury to the customer. AT&T Application at 27-28. In its Opposition, MCI contends that if the stay were granted AT&T will "engage in significant price discrimination" and "damage the public's overriding interest in the further development of an effectively competitive inter-exchange marketplace". MCI Opposition at 17.

3. In the Commission's *Tariff 15 Rejection Order*, we concluded that the discrimination created by the pricing mechanism in Tariff 15 was unreasonable because such a pricing practice creates serious potential anticompetitive consequences. *Tariff 15 Rejection Order* at para. 22. The Commission held that "the discriminatory limitation on the availability of CPP2 affects adversely not only those customers who would be denied service under the terms of the offering but, by virtue of its potential anticompetitive effects, would affect adversely the long-term interests of even those customers who qualify for the discount." *Id.* at para. 14. The Commission rejected CPP2 to "ensure that competitors in [the interstate, interexchange] market do not respond to competitive pressure in ways that may undermine or discourage either procompetitive behavior by other carriers or the competitive procurement of services by users." *Id.* at para. 18.

4. AT&T's public interest argument conflicts with this Commission's findings in its *Tariff 15 Rejection Order*. As noted above, this Commission has already concluded that CPP2 retards rather than fosters competition, despite AT&T's brief allegation here to the contrary. Furthermore, although AT&T alleges that CPP2 customers would be injured by our denial of its stay request, this Commission has already concluded that the sustained operation of such a pricing practice would have an adverse affect on all customers. AT&T's public interest showing is essentially a cursory repetition of arguments already considered and rejected by this Commission in reaching our decision to declare CPP2 unlawful. Therefore, AT&T has failed to demonstrate that a grant of its application would serve the public interest. In these circumstances, it is unnecessary to examine arguments relating to the other "prongs" in the four-part test.

5. Accordingly, IT IS ORDERED that the application for stay filed by AT&T Communications IS DENIED.

FEDERAL COMMUNICATIONS COMMISSION

Donna R. Searcy
Secretary

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[1] AT&T Application for Stay of Order Pending Appellate Review, filed Sept. 30, 1991 (AT&T Application).
[2] AT&T Communications, Inc., Tariff F.C.C. No. 15, 91-252, Mimeo 38222, released Sept. 16, 1991 (*Tariff 15 Rejection Order*).
[3] MCI Opposition to Application for Stay of Order Pending Appellate Review, filed Oct. 7, 1991 (MCI Opposition).
[4] *Virginia Petroleum Jobbers Association v. Federal Power Commission*, 259 F.2d 921 (D.C. Cir. 1958) (*Jobbers*). *See e.g.*, In Re Application of WWOR-TV Inc., 6 FCC Rcd 193, 205 (1990).
[5] *Jobbers*, 259 F.2d at 925.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 91-342

In the Matter of

Amendment of Section 73.606(b), RM-6976
Table of Allotments,
Television Broadcast Stations.
(Ardmore, Oklahoma and
Sherman, Texas)

NOTICE OF PROPOSED RULE MAKING

Adopted: November 14, 1991; Released: November 29, 1991

Comment Date: January 21, 1992
Reply Comment Date: February 5, 1992

By the Chief, Mass Media Bureau:

1. The Commission has before it the petition for rule making filed by K-Twelve, Ltd. ("petitioner"), licensee of Station KXII(TV), Channel 12, Ardmore, Oklahoma. Petitioner seeks to reallot Channel 12 to Sherman, Texas, and to modify its authorization accordingly, pursuant to Commission Rule 1.420(i).[1]

2. Petitioner notes that since 1966, Station KXII(TV) has operated with its main studio and offices situated within the city limits of Sherman. Its transmitter is located between Ardmore and Sherman. From its transmitter site, Station KXII(TV) serves Sherman with a signal in excess of city grade strength.

3. Petitioner claims that economic and demographic trends positioning Sherman as the center of the station's market, and the most important community between Dallas, Texas, and Oklahoma City, Oklahoma, necessitate the requested channel reallotment to Sherman. It states that the 1980 United States Census listed Ardmore's population as 23,689 persons, compared to 30,413 persons in Sherman. Petitioner claims that according to a 1989 Arbitron study, there are 17,900 television households in Carter County, in which Ardmore is located, compared to 37,600 television households in Grayson County, in which Sherman is located. Petitioner also notes that Sherman has more major employers than Ardmore; that the total payroll of Sherman is larger than that of Ardmore; that Sherman has two colleges, whereas Ardmore has none; that Sherman has more bank deposits than Ardmore; and that Sherman has more gross retail sales than Ardmore.

4. Petitioner notes that the reallotment of Channel 12 to Sherman is mutually exclusive with the channel's present use in Ardmore. Petitioner argues that this change would result in a preferential arrangement in allotments because if each community was compared for the allotment of a VHF television channel, assuming that neither community had a television allotment, Sherman would be the preferred community since it is larger, and more important to the surrounding region, than Ardmore. Petitioner notes that if the Commission so wishes, vacant Channel 20 at Sherman can be reallotted to Ardmore to provide that community with the future possibility of its own television transmission service.[2]

5. Finally, petitioner states that it will continue to operate Channel 12 from its current site, thereby continuing to serve both Ardmore and Sherman with city grade service. Petitioner also states that there is no new transmitter site that can be selected that will remove city grade service from Ardmore. As a result, its technical service will remain unchanged. As for its programming, petitioner intends to operate Station KXII(TV) "in a manner similar to the station's operation over the past 33 years, " continuing its devotion to local news and public affairs within its market.

6. We believe the public interest would be served by soliciting comment on petitioner's proposal. While this proposal would, for purposes of Section 73.1120, remove the sole local commercial television transmission service from Ardmore, it would provide a first operational local commercial television transmission service to the larger

[1] This petition for rule making was originally dismissed by letter on the grounds that the proposal would not result in a preferred distribution of facilities under our allotment priorities and policies. The letter noted that this proposal would remove Ardmore's only local transmission service. *See* Letter from Chief, Allocations Branch, to counsel for K-Twelve, Ltd. (February 1, 1990). Petitioner filed an appeal of the letter dismissal and again requested the initiation of a rule making proceeding.

After petitioner filed its appeal, the Commission stated that waivers of the prohibition on removal of a community's only local transmission service would be considered in conjunction with petitions to change community of license. *See Amendment of the Commission's Rules Regarding Modification of FM and TV Authorizations to Specify a New Community of License (Memorandum Opinion and Order) ("Community of License MO&O")*, 5 FCC Rcd 7094, 7096 (1990). Therefore, we now believe that seeking additional comment on petitioner's proposal is desirable. We issue this *Notice* and will dismiss petitioner's application for review as moot at the termination of this proceeding.

[2] The Commission has stated that the allotment of a vacant channel to a community, although a factor to be considered in favor of a proposal, does not, in and of itself, adequately cure the disruption to "existing service" occasioned by removal of an operating station. *See Community of License MO&O*, 5 FCC Rcd 7094, 7097 (1990).

Furthermore, Channel 20 at Ardmore is within the minimum co-channel distance to the Dallas-Fort Worth market. Pursuant to *Order, Advanced Television Systems and Their Impact on the Existing Television Broadcast Service*, 52 Fed. Reg. 28346, published July 29, 1987, the Commission will not accept applications for construction permits for television stations for vacant television allotments within the minimum co-channel separation distance of thirty cities, including Dallas-Fort Worth, pending completion of the advanced television proceeding. Therefore, even if we were to reallot Channel 20 to Ardmore, no applications may be filed for that channel until the freeze is lifted.

community of Sherman.[3] Furthermore, we note that petitioner does not intend to move its transmitter site from its present location. Therefore, Ardmore would, as a practical matter, continue to receive the same level of reception service from Station KXII(TV) as it currently enjoys.

7. Although the *Community of License MO&O* restricts the removal of a community's sole local broadcast service, that document also states that a waiver of the prohibition will be considered "in the rare circumstances where removal of a local service might serve the public interest." *Id.*, 5 FCC Rcd 7096. As an example, we noted that we might consider removal of a sole local transmission service if reallotment would provide a first reception service to a significantly sized population, a higher priority under our television allotment criteria.[4] In this case, petitioner maintains that the public interest benefits of removing the sole local service are that Channel 12 will be allotted to the larger, growing community, and that Station KXII(TV) will continue to maintain the existing level of service to both Ardmore and Sherman if its request is granted. In general, we do not believe that the public interest is served by removing a community's sole local transmission service merely to provide a first local transmission service to another community. We request comment as to why we should, or should not, do so in this instance.

8. In adopting Rule 1.420(i), we stated that the degree of service a licensee will maintain to its original community of license will not be considered as a factor in making our decision, lest we be required to ensure that coverage is provided to the original community in perpetuity.[5] We request comment responsive to this concern that we would be required to ensure continued coverage.

9. The *Community of License MO&O* stated that the public has a legitimate expectation that existing service will continue, and this expectation is a factor to be weighed independently against the service benefits that may result from reallotting a channel. Removal of service is warranted only if there are sufficient public interest factors to offset the expectation of continued service. Petitioner has stated that it currently maintains studios in both Ardmore and Sherman, and that it will continue to maintain these facilities if this proposal is granted. We request petitioner to submit additional information regarding any possible disruption regarding removal of Ardmore's local service, how that disruption can be minimized, and how Station KXII(TV) will continue to serve the needs of Ardmore.

10. Finally, we request petitioner to submit any additional information as to the overall public interest benefits that would flow from grant of this proposal.

11. Channel 12 can be reallotted from Ardmore, Oklahoma, to Sherman, Texas, in compliance with the minimum distance separation requirements of Sections 73.610 and 73.698 of the Commission's Rules at petitioner's current site.[6] In addition, we propose to modify the authorization of Station KXII(TV) to specify Sherman in lieu of Ardmore pursuant to Commission Rule 1.420(i).

12. Accordingly, we seek comments on the proposal to amend the Television Table of Allotments, Section 73.606(b) of the Commission's Rules, with respect to the following communities:

	Channel No.	
City	Present	Proposed
Ardmore, Oklahoma	12-, *17, *28-	*17, *28-
Sherman, Texas	20-, *26-	12-, 20-, *26-

13. The Commission's authority to institute rule making proceedings, showings required, cut-off procedures, and filing requirements are contained in the attached Appendix and are incorporated by reference herein. In particular, we note that a showing of continuing interest is required by paragraph 2 of the Appendix before a channel will be allotted.

14. Interested parties may file comments on or before **January 21, 1992,** and reply comments on or before **February 5, 1992,** and are advised to read the Appendix for the proper procedures. Comments should be filed with the Secretary, Federal Communications Commission, Washington, D.C. 20554. Additionally, a copy of such comments should be served on the petitioner, or its counsel or consultant, as follows:

Alfred C. Cordon, Esq.
Dennis J. Kelly, Esq.
Cordon and Kelly
Second Floor
1920 N Street, N.W.
Washington, D.C. 20036
(Counsel to K-Twelve, Ltd.)

15. The Commission has determined that the relevant provisions of the Regulatory Flexibility Act of 1980 do not apply to rule making proceedings to amend the Television Table of Allotments, Section 73.606(b) of the Commission's Rules. See *Certification that Sections 603 and 604 of the Regulatory Flexibility Act Do Not Apply to Rule*

[3] We note that there are two vacant noncommercial allotments in Ardmore. There is one vacant commercial, and one vacant noncommercial, allotment in Sherman.

[4] The television allotment criteria are (1) to provide at least one television service to all parts of the United States, (2) to provide each community with at least one television broadcast station, (3) to provide a choice of at least two television services to all parts of the United States, (4) to provide each community with at least two television broadcast stations, and (5) to assign any remaining channels to communities based on population, geographic location, and the number of television services available to the community from stations located in other communities. *See Sixth Report and Order*, 41 FCC 148, 167 (1952).

[5] *Amendment of the Commission's Rules Regarding Modification of FM and TV Authorizations to Specify a New Community of License (Report and Order) ("Community of License R&O")*, 4 FCC Rcd 4870, 4873 (1989).

[6] Proposed coordinates for Channel 12 at Sherman are North Latitude 34-01-58 and West Longitude 96-48-00.

Making to Amend Sections 73.202(b), 73.504 and 73.606(b) of the Commission's Rules, 46 FR 11549, February 9, 1981.

16. For further information concerning this proceeding, contact Arthur Scrutchins, Mass Media Bureau, (202) 634-6530. For purposes of this restricted notice and comment rule making proceeding, members of the public are advised that no *ex parte* presentations are permitted from the time the Commission adopts a Notice of Proposed Rule Making until the proceeding has been decided and such decision is no longer subject to reconsideration by the Commission or review by any court. An *ex parte* presentation is not prohibited if specifically requested by the Commission or staff for the clarification or adduction of evidence or resolution of issues in the proceeding. However, any new written information elicited from such a request or a summary of any new oral information shall be served by the person making the presentation upon the other parties to the proceeding unless the Commission specifically waives this service requirement. Any comment which has not been served on the petitioner constitutes an *ex parte* presentation and shall not be considered in the proceeding. Any reply comment which has not been served on the person(s) who filed the comment, to which the reply is directed, constitutes an *ex parte* presentation and shall not be considered in the proceeding.

FEDERAL COMMUNICATIONS COMMISSION

Roy J. Stewart
Chief, Mass Media Bureau

APPENDIX

1. Pursuant to authority found in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61 0.204(b) and 0.283 of the Commission's Rules, IT IS PROPOSED TO AMEND the TV Table of Allotments, Section 73.606(b) of the Commission's Rules and Regulations, as set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached.

2. *Showings Required*. Comments are invited on the proposal(s) discussed in the *Notice of Proposed Rule Making* to which this Appendix is attached. Proponent(s) will be expected to answer whatever questions are presented in initial comments. The proponent of a proposed allotment is also expected to file comments even if it only resubmits or incorporates by reference its former pleadings. It should also restate its present intention to apply for the channel if it is allotted and, if authorized, to build a station promptly. Failure to file may lead to denial of the request.

3. *Cut - off Procedures*. The following procedures will govern the consideration of filings in this proceeding.

(a) Counterproposals advanced in this proceeding itself will be considered if advanced in initial comments, so that parties may comment on them in reply comments. They will not be considered if advanced in reply comments. *(See* Section 1.420(d) of the Commission's Rules.)

(b) With respect to petitions for rule making which conflict with the proposal(s) in this *Notice*, they will be considered as comments in the proceeding, and Public Notice to this effect will be given as long as they are filed before the date for filing initial comments herein. If they are filed later than that, they will not be considered in connection with the decision in this docket.

(c) The filing of a counterproposal may lead the Commission to allot a different channel than was requested for any of the communities involved.

4. *Comments and Reply Comments; Service*. Pursuant to applicable procedures set out in Sections 1.415 and 1.420 of the Commission's Rules and Regulations, interested parties may file comments and reply comments on or before the dates set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached. All submissions by parties to this proceeding or by persons acting on behalf of such parties must be made in written comments, reply comments, or other appropriate pleadings. Comments shall be served on the petitioner by the person filing the comments. Reply comments shall be served on the person(s) who filed comments to which the reply is directed. Such comments and reply comments shall be accompanied by a certificate of service. *(See* Section 1.420(a), (b) and (c) of the Commission's Rules.)

5. *Number of Copies*. In accordance with the provisions of Section 1.420 of the Commission's Rules and Regulations, an original and four copies of all comments, reply comments, pleadings, briefs, or other documents shall be furnished the Commission.

6. *Public Inspection of Filings*. All filings made in this proceeding will be available for examination by interested parties during regular business hours in the Commission's Public Reference Room at its headquarters, 1919 M Street N.W., Washington, D.C.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 91-343

In the Matter of

Amendment of Section 73.202(b), RM-7858
Table of Allotments,
FM Broadcast Stations.
(Sulphur, Oklahoma)

NOTICE OF PROPOSED RULE MAKING

Adopted: November 13, 1991; Released: November 29, 1991

Comment Date: January 21, 1992
Reply Comment Date: February 5, 1992

By the Assistant Chief, Allocations Branch:

1. The Commission has before it the petition for rule making filed by Central Oklahoma Radio Corporation ("petitioner") requesting the substitution of Channel 265C2 for Channel 265C3 at Sulphur, Oklahoma, and the modification of Station KFXT(FM)'s license to specify operation on the higher class channel. Petitioner states that it will apply for the channel, if allotted.

2. We believe the public interest would be served by proposing the substitution of Channel 265C2 for Channel 265C3 at Sulphur, Oklahoma, since it could provide the community with a wide coverage area FM service and enable Station KFXT(FM) to expand its service area. Channel 265C2 can be allotted to Sulphur in compliance with the Commission's minimum distance separation requirements at the station's presently licensed transmitter site.[1] As requested, we also propose to modify Station KFXT(FM)'s license to specify operation on the higher class channel. In accordance with Section 1.420(g) of the Commission's Rules, we will not accept competing expressions of interest in use of the channel at Sulphur or require the petitioner to demonstrate the availability of an additional equivalent class channel for use by such parties.

3. Accordingly, we seek comments on the proposed amendment of the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, for the community listed below, to read as follows:

	Channel No.	
City	Present	Proposed
Sulphur, Oklahoma	265C3	265C2

4. The Commission's authority to institute rule making proceedings, showings required, cut-off procedures, and filing requirements are contained in the attached Appendix and are incorporated by reference herein. In particular, we note that a showing of continuing interest is required by paragraph 2 of the Appendix before a channel will be allotted.

5. Interested parties may file comments on or before **January 21, 1992,** and reply comments on or before **February 5, 1992,** and are advised to read the Appendix for the proper procedures. Comments should be filed with the Secretary, Federal Communications Commission, Washington, D.C. 20554. Additionally, a copy of such comments should be served on the petitioner, or its counsel or consultant, as follows:

Jeffrey D. Southmayd, Esq.
Southmayd & Miller
1233-20th Street, N.W., Suite 205
Washington, D.C. 20036
(Counsel to petitioner)

6. The Commission has determined that the relevant provisions of the Regulatory Flexibility Act of 1980 do not apply to rule making proceedings to amend the FM Table of Allotments, Section 73.202(b) of the Commission's Rules. *See Certification That Sections 603 and 604 of the Regulatory Flexibility Act Do Not Apply to Rule Making to Amend Sections 73.202(b), 73.504 and 73.606(b) of the Commission's Rules,* 46 FR 11549, February 9, 1981.

7. For further information concerning this proceeding, contact Leslie K. Shapiro, Mass Media Bureau, (202) 634-6530. For purposes of this restricted notice and comment rule making proceeding, members of the public are advised that no *ex parte* presentations are permitted from the time the Commission adopts a Notice of Proposed Rule Making until the proceeding has been decided and such decision is no longer subject to reconsideration by the Commission or review by any court. An *ex parte* presentation is not prohibited if specifically requested by the Commission or staff for the clarification or adduction of evidence or resolution of issues in the proceeding. However, any new written information elicited from such a request or a summary of any new oral information shall be served by the person making the presentation upon the other parties to the proceeding unless the Commission specifically waives this service requirement. Any comment which has not been served on the petitioner constitutes an *ex parte* presentation and shall not be considered in the proceeding. Any reply comment which has not been served on the person(s) who filed the comment, to which the reply is directed, constitutes an *ex parte* presentation and shall not be considered in the proceeding.

[1] The coordinates for Channel 265C2 at Sulphur are North Latitude 34-32-57 and West Longitude 96-58-34.

FEDERAL COMMUNICATIONS COMMISSION

Michael C. Ruger
Assistant Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

APPENDIX

1. Pursuant to authority found in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61 0.204(b) and 0.283 of the Commission's Rules, IT IS PROPOSED TO AMEND the FM Table of Allotments, Section 73.202(b) of the Commission's Rules and Regulations, as set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached.

2. *Showings Required.* Comments are invited on the proposal(s) discussed in the *Notice of Proposed Rule Making* to which this Appendix is attached. Proponent(s) will be expected to answer whatever questions are presented in initial comments. The proponent of a proposed allotment is also expected to file comments even if it only resubmits or incorporates by reference its former pleadings. It should also restate its present intention to apply for the channel if it is allotted and, if authorized, to build a station promptly. Failure to file may lead to denial of the request.

3. *Cut - off Procedures.* The following procedures will govern the consideration of filings in this proceeding.

(a) Counterproposals advanced in this proceeding itself will be considered if advanced in initial comments, so that parties may comment on them in reply comments. They will not be considered if advanced in reply comments. *(See* Section 1.420(d) of the Commission's Rules.)

(b) With respect to petitions for rule making which conflict with the proposal(s) in this *Notice,* they will be considered as comments in the proceeding, and Public Notice to this effect will be given as long as they are filed before the date for filing initial comments herein. If they are filed later than that, they will not be considered in connection with the decision in this docket.

(c) The filing of a counterproposal may lead the Commission to allot a different channel than was requested for any of the communities involved.

4. *Comments and Reply Comments; Service.* Pursuant to applicable procedures set out in Sections 1.415 and 1.420 of the Commission's Rules and Regulations, interested parties may file comments and reply comments on or before the dates set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached. All submissions by parties to this proceeding or by persons acting on behalf of such parties must be made in written comments, reply comments, or other appropriate pleadings. Comments shall be served on the petitioner by the person filing the comments. Reply comments shall be served on the person(s) who filed comments to which the reply is directed. Such comments and reply comments shall be accompanied by a certificate of service. *(See* Section 1.420(a), (b) and (c) of the Commission's Rules.)

5. *Number of Copies.* In accordance with the provisions of Section 1.420 of the Commission's Rules and Regulations, an original and four copies of all comments, reply comments, pleadings, briefs, or other documents shall be furnished the Commission.

6. *Public Inspection of Filings.* All filings made in this proceeding will be available for examination by interested parties during regular business hours in the Commission's Public Reference Room at its headquarters, 1919 M Street N.W., Washington, D.C.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 91-231

In the Matter of

Amendment of Section 73.202(b), RM-7233
Table of Allotments,
FM Broadcast Stations.
(Odessa, Texas)

REPORT AND ORDER
(Proceeding Terminated)

Adopted: November 13, 1991; Released: November 29, 1991

By the Assistant Chief, Allocations Branch:

1. At the request of Oil Patch Broadcasting Partnership ("petitioner"), the Commission has before it the *Notice of Proposed Rule Making*, 6 FCC Rcd 4756 (1991), proposing the allotment of Channel 299C2 to Odessa, Texas. Petitioner filed comments stating its preference for the allotment of Channel 267C2 rather than Channel 299C2 at Odessa, but states it will apply for either channel, if allotted.[1]

2. We believe the public interest would be served by the allotment of Channel 299C2 to Odessa, since it could provide the community with an additional local FM service. Channel 299C2 can be allotted to Odessa in compliance with the Commission's minimum distance separation requirements with a site restriction of 28.8 kilometers (17.9 miles) south to avoid a short-spacing to a construction permit (BPH-890712MK) for Station KYMI(FM), Channel 300C2, Los Ybane, Texas.[2] Furthermore, since Odessa is located within 320 kilometers (199 miles) of the U.S.-Mexican border, concurrence of the Mexican government has been obtained for this allotment.

3. Accordingly, pursuant to the authority contained in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61, 0.204(b) and 0.283 of the Commission's Rules, IT IS ORDERED, That effective **January 13, 1992,** the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, IS AMENDED, with respect to the community listed below, to read as follows:

City	Channel No.
Odessa, Texas	242C2, 245C1
	250C1, 256C1
	299C2

4. The window period for filing applications will open on **January 14, 1992,** and close on **February 13, 1992.**

5. IT IS FURTHER ORDERED, That this proceeding IS TERMINATED.

6. For further information concerning this proceeding, contact Pamela Blumenthal, Mass Media Bureau, (202) 634-6530.

FEDERAL COMMUNICATIONS COMMISSION

Michael C. Ruger
Assistant Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

[1] As stated in the *Notice*, petitioner's proposal to allot Channel 267C2 to Odessa would be in conflict with a petition for rule making proposing the substitution of Channel 267C1 for Channel 265A at Crane, Texas. *See Notice of Proposed Rule Making*, 6 FCC Rcd 4725 (1991). In an effort to resolve the conflict, the staff determined the availability of an alternate Class C2 for use at Odessa, thereby eliminating any possible conflict with the Crane, Texas, proceeding.

[2] The coordinates for Channel 299C2 at Odessa are North Latitude 31-36-44 and West Longitude 102-28-21.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 91-244

In the Matter of

Amendment of Section 73.202(b),	RM-7776
Table of Allotments,	
FM Broadcast Stations.	
(Churubusco, Indiana)	

REPORT AND ORDER
(Proceeding Terminated)

Adopted: November 13, 1991; Released: November 29, 1991

By the Assistant Chief, Allocations Branch:

1. The Commission considers herein the *Notice of Proposed Rule Making*, 6 FCC Rcd 4969 (1991), issued in response to a petition filed on behalf of Robert M. Peters ("petitioner"), proposing the substitution of Channel 242B1 for Channel 242A at Churubusco, Indiana, and modification of the permit for Station WKQM(FM) (BPH-880107MH) accordingly. Petitioner filed supporting comments stating his intention to apply for Channel 242B1, if it is allotted to Churubusco as requested. No other comments were received.

2. We believe the public interest would be served by substituting Channel 242B1 for Channel 242A at Churubusco since it could provide an enhanced service to the community. Therefore, in accordance with the provisions of Section 1.420(g) of the Commission's Rules, we will substitute Channel 242B1 for Channel 242A and modify the permit of Robert M. Peters, as requested. As indicated in the *Notice*, Channel 242B1 can be allotted to Churubusco consistent with the minimum distance separation requirements of Section 73.207(b) of the Commission's Rules at the petitioner's specified site.[1] Since Churubusco is located within 320 kilometers (200 miles) of the Canadian border, concurrence of that government has been obtained.[2]

3. Accordingly, pursuant to the authority contained in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61, 0.204(b) and 0.283 of the Commission's Rules, IT IS ORDERED, That effective **January 13, 1992,** the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, IS AMENDED with respect to the community listed below, as follows:

City	Channel No.
Churubusco, Indiana	242B1

4. IT IS FURTHER ORDERED, That pursuant to Section 316(a) of the Communications Act of 1934, as amended, the construction permit of Robert M. Peters (BPH-880107MH), for Station WKQM(FM), IS MODIFIED to specify operation on Channel 242B1 in lieu of Channel 242A, subject to the following conditions:

(a) Within 90 days of the effective date of this *Order*, the permittee shall submit to the Commission a minor change application for a construction permit (Form 301), specifying the new facility;

(b) Upon grant of the construction permit, program tests may be conducted in accordance with Section 73.1620; and

(c) Nothing contained herein shall be construed to authorize a change in transmitter location or to avoid the necessity of filing an environmental impact statement pursuant to Section 1.1301 of the Commission's Rules.

5. Pursuant to Commission Rule Section 1.1104(1)(k) and (2)(k), any party seeking a change of community of license of an FM or television allotment or an upgrade of an existing FM allotment, **if the request is granted,** must submit a rule making fee when filing its application to implement the change in community of license and/or upgrade. As a result of this proceeding, Robert M. Peters, permittee of Station WKQM(FM), is required to submit a rule making fee in addition to the fee required for the applications to effect the upgrade.

6. IT IS FURTHER ORDERED, That this proceeding IS TERMINATED.

7. For further information concerning the above, contact Nancy Joyner, Mass Media Bureau, (202) 634-6530.

FEDERAL COMMUNICATIONS COMMISSION

Michael C. Ruger
Assistant Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

[1] Coordinates for Channel 242B1 at Churubusco are 41-11-32 and 85-14-02.

[2] Consent was previously obtained in connection with petitioner's construction permit for Channel 242A, which specified 6 kW ERP. Additionally, petitioner's specified site for Channel 242B1 is further removed from the Canadian border than is the site designated in his construction permit for Channel 242A. Therefore, additional concurrence from the Canadian government was not required for this proposal.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 91-247

In the Matter of

Amendment of Section 73.202(b), RM-7768
Table of Allotments,
FM Broadcast Stations.
(Clayton, Louisiana)

REPORT AND ORDER
(Proceeding Terminated)

Adopted: November 13, 1991; Released: November 29, 1991

By the Assistant Chief, Allocations Branch:

1. At the request of Annette V. Antzes ("petitioner"), the Commission has before it the *Notice of Proposed Rule Making*, 6 FCC Rcd 4875 (1991), proposing the allotment of Channel 300A to Clayton, Louisiana. Petitioner filed comments reiterating her intention to apply for the channel, if allotted. No other comments were received.

2. We believe the public interest would be served by the allotment of Channel 300A to Clayton, Louisiana, since it could provide the community with its first local FM service. Channel 300A can be allotted to Clayton in compliance with the Commission's minimum distance separation requirements with a site restriction of 2.7 kilometers (1.7 miles) north in order to avoid a short-spacing to a construction permit (BPH-890712MH) for Channel 299A, Woodville, Mississippi.[1]

3. Accordingly, pursuant to the authority contained in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61, 0.204(b) and 0.283 of the Commission's Rules, IT IS ORDERED, That effective **January 13, 1992,** the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, IS AMENDED, with respect to the community listed below, to read as follows:

City	Channel No.
Clayton, Louisiana	300A

4. The window period for filing applications will open on **January 14, 1992,** and close on **February 13, 1992.**

5. IT IS FURTHER ORDERED, That this proceeding IS TERMINATED.

6. For further information concerning this proceeding, contact Pamela Blumenthal, Mass Media Bureau, (202) 634-6530.

FEDERAL COMMUNICATIONS COMMISSION

Michael C. Ruger
Assistant Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

[1] The coordinates for Channel 300A at Clayton are North Latitude 31-44-42 and West Longitude 91-32-54. Although we stated in the *Notice* that the allotment of Channel 300A to Clayton did not require the imposition of a site restriction, we have determined the need for a site restriction to avoid a short-spacing to the construction permit for Channel 299A at Woodville, Mississippi.

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

Dawson B. Nail FOIA Control No. 91-111
On Request for Inspection
of Records

MEMORANDUM OPINION AND ORDER

Adopted: November 18, 1991; Released: November 29, 1991

By the Commission:

1. The Commission has before it an Application for Review filed by Dawson B. Nail, appealing a July 1, 1991 Freedom of Information (FOIA) decision by the General Counsel. The General Counsel denied Mr. Nail's request for access to certain documents pertaining to an investigation of press leaks surrounding the Commission's financial interest and syndication (fin-syn) proceeding. The investigation was conducted by the Commission's Office of Inspector General. As discussed herein, we affirm the General Counsel's ruling.

BACKGROUND

2. In February 1991, the Commission's Office of Inspector General (OIG) initiated an investigation of press leaks in connection with the financial interest and syndication proceeding (fin-syn).[1] By request dated May 29, 1991, Mr. Nail sought access to copies of all internal or external correspondence, memos, files, internal documents, or other Commission records pertaining to the OIG investigation. The General Counsel identified 58 documents in response to Mr. Nail's FOIA request but withheld 39 of these documents.[2] The General Counsel found that some of the documents contained information pertaining to the internal practices of the Commission. Access to these documents was denied under Exemption 2 of the FOIA. [3] The General Counsel also found that other documents reflected the agency's decisionmaking process in the fin-syn proceeding, the OIG's deliberations concerning the scope and development of its investigation, and the agency's deliberations concerning the need for measures to prevent premature public releases of information. These documents were protected from disclosure pursuant to the deliberative process privilege embodied in Exemption 5 of the FOIA.[4]

DISCUSSION

3. On review, Mr. Nail challenges the General Counsel's determination to withhold one of the identified documents under Exemptions 2 and 5. The document at issue is a two-page memorandum dated June 5, 1991, from the Inspector General to the Chairman. The memorandum contains the Inspector General's opinion about the origin of premature releases of information and his recommendations for preventive measures. Mr. Nail states that Exemption 2 protects matters that are related solely to "internal personnel" rules and practices of the agency in which there is no significant public interest. He argues that the document is not protected under Exemption 2 because it does not pertain to "personnel" matters, and the information contained therein raises significant public interest issues.

4. Exemption 2 protects from disclosure a wide range of administrative information regardless of whether it is "personnel" related, and expressly has been interpreted to protect internal agency practices. *See Founding Church of Scientology*, 721 F.2d at 828, 830 n.4 (D.C. Cir. 1983). The document at issue discusses certain measures by which the Commission could avoid premature releases of information. This type of information relates to internal agency practices and, therefore, clearly falls within the scope of Exemption 2.

5. Further, Exemption 2 protects internal records whose disclosure would significantly risk circumvention of statutes or agency regulations. *See Crooker v. Bureau of Alcohol, Tobacco & Firearms*, 670 F.2d 1051 (D.C. Cir. 1981) (en banc). In this connection, Mr. Nail argues that the General Counsel made no showing that release of the document would have such impact. We disagree. The General Counsel, citing 47 C.F.R. § 19.735-206, indicated that disclosure of the type of information contained in the document at issue would risk circumvention of the Commission's rules against unauthorized disclosures of information. Further, the General Counsel explained that disclosure could provide a blueprint for Commission employees to frustrate any future inquiry that the Commission or the OIG may conduct with respect to this or similar allegations of press leaks within the context of Commission proceedings. *See PHE, Inc. v. Department of Justice*, Civil No. 90-1461 (D.D.C. Jan. 31, 1991). Therefore, we find that the General Counsel's decision correctly applied Exemption 2.

6. As noted above, the General Counsel also withheld the document at issue under the deliberative process privilege embodied in Exemption 5 of the FOIA. In this connection, Mr. Nail argues that the Exemption 5 claim is unjustified because "the public is unaware of any policy evolving as a result of the discussions embodied in [the document]." In addition, Mr. Nail indicates that the Commission should disclose previously made decisions and any review of compliance with existing policies that may be discussed in the document.

7. Case law concerning Exemption 5 has established that an agency may invoke the deliberative process privilege if it can identify the decisionmaking process to which a document contributed, even if the agency is unable to identify a decision generated subsequent to the creation of the document. *See NLRB v. Sears, Roebuck & Co.*, 421 U.S. 132, 151 n. 18 (1975); *Access Reports v. Department of Justice*, 926 F.2d 1192 (D.C. Cir. 1991). Thus, the courts have focused on the role of the document in the decisionmaking process, and whether disclosure of the information at issue would discourage candid discussions within the agency. *See NLRB v. Sears*, 421 U.S. at 152 n. 19; *Dudman Communications Corp. v. Department of Air Force*, 815 F.2d 1565, 1567-68 (D.C. Cir. 1987); *National Security Archives v. F. B. I.*, 759 F. Supp. 872, 880 (D.D.C. 1991).

8. Initially, we note that the document at issue does not deal with decisions made by the Commission prior to the creation of the memorandum. Rather, the document con-

tains the IG's opinion about the origin of premature releases of information and his recommendations for corrective measures in this area. Specifically, as noted by the General Counsel, the document was prepared to assist the Chairman in determining which corrective measures would be appropriate to minimize premature releases of information to the press. The IG's recommendations, however, do not constitute final agency policy. The kind of advisory information contained in the document is squarely within the scope of the deliberative process privilege. *See Access Reports v. Department of Justice*, 926 F.2d at 1196.

9. Finally, Mr. Nail argues that the General Counsel failed to disclose any non-exempt portions of the 39 withheld documents. We have carefully reviewed the documents, however, and conclude that the General Counsel correctly determined that any materials withheld are within either Exemption 2 or 5. Therefore, we shall not disturb the ruling below.

CONCLUSION

10. In view of the foregoing, the Application for Review filed by Dawson B. Nail IS DENIED. Mr. Nail may seek judicial review of this decision pursuant to 5 U.S.C. § 552(a)(4)(B).

11. The officials responsible for this action are the following Commissioners: Alfred C. Sikes, Chairman, James H. Quello, Sherrie P. Marshall, Andrew C. Barrett and Ervin S. Duggan.

FEDERAL COMMUNICATIONS COMMISSION

Donna R. Searcy
Secretary

FOOTNOTES

[1] *In the Matter of Evaluation of the Syndication and Financial Interest Rules, Report and Order*, 6 FCC Rcd. 3094 (1991).

[2] The General Counsel disclosed portions of one of the withheld documents.

[3] Exemption 2 protects records "related solely to the internal personnel rules and practices of an agency." 5 U.S.C. § 552(b)(2).

[4] Exemption 5 of the FOIA prevents the disclosure of "inter-agency or intra-agency memorandums or letters which would not be available by law to a party other than an agency in litigation with the agency." 5 U.S.C. § 552(b)(5). The exemption has been extended to incorporate certain common law privileges developed in civil discovery cases, including, among others, the deliberative process privilege. *See Coastal States Gas Corp. v. Dept. of Energy*, 617 F.2d 854 (D.C. Cir. 1980).

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

Standards for Assessing
Forfeitures

ORDER

Adopted: November 20, 1991; Released: November 29, 1991

By the Commission:

1. In this *Order*, we deny a petition to stay our *Policy Statement*, *Standards for Assessing Forfeitures*, 6 FCC Rcd 4695 (1991) (*Policy Statement*), filed on behalf of 22 common carrier radio licensees (Licensees).[1]

2. Licensees have not met the requirements for a stay. *See Washington Metropolitan Area Transit Commission v. Holiday Tours, Inc.*, 559 F.2d 841 (D.C. Cir 1971); *Virginia Petroleum Jobbers Association v. Federal Power Commission*, 259 F.2d 921 (D.C. Cir. 1958). In particular, Licensees have made no showing of irreparable injury. Licensees argue that the *Policy Statement* causes irreparable injury in light of the "severe economic hardships" imposed on them from the "possibility of an enormous fine" and the "large increase in operating expenses" that will be caused from the "mere threat of such fines."[2] Specifically, Licensees contend that they will suffer irreparable harm from the *Policy Statement* because: (1) they will lose their tower leases as tower companies will no longer be willing to follow the current practice of accepting responsibility for violations of lighting and marking requirements, which will in turn force Licensees either to relocate subject to higher tower rents or to build their own towers at great expense; (2) they will be forced to hire additional personnel and pay more to lawyers and engineers to ensure compliance with the law; (3) if assessed a forfeiture they may have to terminate their operations because the litigation costs of asking for remission or reduction would be prohibitive; and (4) they will be unable to secure financing because the risk of a possible forfeiture will deter lenders from extending credit, which will in turn drive them out of business. [3]

3. These arguments are on their face wholly speculative.[4] Further, the *Policy Statement* simply describes the general approach the Commission may take in forfeiture cases and is not binding on any licensees or the Commission. The *Policy Statement* does not impose any obligations on the Licensees or require the Commission to issue a forfeiture of any particular magnitude -- or any forfeiture at all. For example, through its downward adjustment factor for inability to pay, the *Policy Statement* recognizes that some licensees may not be able to afford substantial forfeitures. Most importantly, proposed forfeiture amounts may be challenged in any proceeding in which they are applied and the Commission has broad discretion to take any equitable factors into account, as relevant, to ensure that Licensees are not assessed substantial forfeitures unless warranted.[5]

4. Accordingly, IT IS ORDERED that the Petition for Stay filed by Blooston, Mordkofsky, Jackson and Dickens on behalf of 22 common carrier radio licensees IS DENIED.

FEDERAL COMMUNICATIONS COMMISSION

Donna R. Searcy
Secretary

FOOTNOTES

[1] Because the *Policy Statement* is already in effect, the request is more properly styled as one for suspension rather than stay. The Commission has received nine petitions for reconsideration of the *Policy Statement*, including one filed by Licensees. Of the nine petitions, eight were filed by representatives of common carriers and one was filed by the National Association for the Advancement of Colored People and other civil rights organizations.

[2] Pet. for Stay at 6.

[3] *Id.* at 6-8. In a related argument regarding the merits of their petition for reconsideration, Licensees argue that the *Policy Statement* will drive numerous carriers out of business and discourage them from providing needed communications services, contrary to the universal service goal of Section 1 of the Communications Act. *Id.* at 3.

[4] Some of these arguments also appear to raise questions regarding the degree to which Licensees are currently taking seriously their obligation to comply with the Communications Act and Commission rules, particularly the tower lighting and marking requirements.

[5] We also note that the 1989 increases in the Commission's forfeiture authority put Licensees on notice that violators of the Communications Act or Commission rules could be subject to substantial forfeitures. *See* 47 U.S.C. 503(b) (as amended by Pub. L. No. 239, 101st Cong., 1st Sess., 103 Stat. 2131 (1989)) (raising Commission forfeiture authority to $100,000 per violation for common carriers); *Victoria Cellular Corporation*, 6 FCC Rcd 4506 (1991), *pet. for recon. pending* (Notice of Apparent Liability (NAL) for $15,000 for failure to file notification of completion of construction); *Emmis Broadcasting*, 6 FCC Rcd 2289 (1991)(NAL for $25,000 for broadcast of false distress signal); *Galesburg Broadcasting Company*, 6 FCC Rcd 2210 (1991) (NAL for $25,000 for unauthorized transfer of control); *Data Investments, Inc.*, 6 FCC Rcd 4496 (1991), *pet. for recon. pending* (NAL for $150,000 for unauthorized construction and operation of facilities in Public Land Mobile Service); and *David R. Price*, 6 FCC Rcd 2585 (1991) (Notice of Forfeiture for $250,000 for failure to light tower and unauthorized discontinuance of operation).

Before the
Federal Communications Commission
Washington, D.C. 20554

PR Docket No. 91-270

In the Matter of

Washington Public Safety Plan

ORDER

Adopted: November 15, 1991; Released: November 29, 1991

By the Chief, Private Radio Bureau and the Chief Engineer:

1. On August 21, 1991, Region 43 (Washington) submitted its public safety plan to the Commission for review. The plan sets forth the guidelines to be followed in allotting spectrum to meet current and future mobile communications requirements of the public safety and special emergency entities operating in Washington.

2. The Washington plan was placed on Public Notice for comments on September 12, 1991, 56 FR 47213 (September 18, 1991). The Commission received no comments in this proceeding.

3. We have reviewed the plan submitted for Washington and find that it conforms with the National Public Safety Plan. The plan includes all the necessary elements specified in the *Report and Order* in Gen. Docket No. 87-112, 3 FCC Rcd 905 (1987), and satisfactorily provides for the current and projected mobile communications requirements of the public safety and special emergency entities in Washington.

4. Therefore, we accept the Washington Public Safety Radio Plan. Furthermore, licensing of the 821-824/866-869 MHz band in Washington may commence immediately.

FEDERAL COMMUNICATIONS COMMISSION

Ralph A. Haller
Chief, Private Radio Bureau

Thomas P. Stanley
Chief Engineer

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

Telemarketing Investments, LTD.,
Complainant,

v. File No. E-91-124

US West Communications, Inc.,
Defendant.

ORDER

Adopted: November 20, 1991; Released: November 29, 1991

By the Chief, Enforcement Division, Common Carrier Bureau:

1. On September 24, 1991, Telemarketing Investments, LTD., (TMI) filed the above-captioned complaint alleging that defendants' rates during the period from January 1, 1987, to December 31, 1988, were unjust and unreasonable in violation of 47 U.S.C. § 201(b).

2. On October 23, 1991, TMI filed a Motion for Leave to Withdraw Complaint. TMI states that all claims in the action had been settled prior to the filing of the complaint and that the complaint was filed by mistake.

3. On the basis of the statements contained in the Motion, we grant TMI's dismissal request.

4. Accordingly, IT IS ORDERED, pursuant to authority delegated under 47 C.F.R. § 0.291, that the request for dismissal of the above-captioned complaint IS GRANTED.

5. IT IS FURTHER ORDERED that the above-captioned complaint IS DISMISSED WITH PREJUDICE and the proceeding IS TERMINATED.

FEDERAL COMMUNICATIONS COMMISSION

Mary Beth Richards
Chief, Enforcement Division
Common Carrier Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

In re Matter of the Applications of

Walter Communications Inc.

For Authority to	File Nos. 15639-CM-P-83
Construct and Operate	15773-CM-P-83
Multichannel Multipoint	15627-CM-P-83
Distribution	
Service Stations on the E-group	
Channels at Boise,	
Idaho, Rockford,	
Illinois and Atlantic City,	
New Jersey	

MEMORANDUM OPINION AND ORDER

Adopted: November 20, 1991; Released: November 29, 1991

By the Chief, Domestic Facilities Division:

INTRODUCTION

1. This *Memorandum Opinion and Order* concerns petitions filed by the Committee for Fair MDS Lotteries, United Cable Television Corporation and Rockford/Park Cablevision (Petitioners) to deny the above-referenced applications of Walter Communications, Inc. (WCI) to construct and operate Multichannel Multipoint Distribution Service (MMDS) stations on the E-group channels in the Boise, Idaho, Rockford, Illinois and Atlantic City, New Jersey markets. WCI was chosen as the tentative selectee for the E-group channels in the Boise, Rockford, and Atlantic City markets as the result of Commission lotteries. For the reasons discussed below, we deny the petitions.

ARGUMENTS

2. Petitioners generally contend that WCI and fifteen other MMDS applicants,[1] acting in a coordinated effort and under the direction of Bruce Merrill (Merrill),[2] sought to gain control over both MMDS channel groups in the nation's major markets by filing, under different corporate names, virtually identical applications in each of these markets. By doing so, Petitioners allege, these sixteen applicants violated the Commission's rules which were designed to ensure that no one applicant has more than one chance in an MMDS lottery in a given market. Petitioners request an evidentiary hearing on WCI's lottery-winning Boise, Rockford and Atlantic City applications because, they argue, the following circumstances raise a substantial and material question of fact as to whether Merrill is the undisclosed real party-in-interest behind WCI's applications in violation of Section 21.13(a)(1) of the Commission's Rules, 47 C.F.R. § 21.13(a)(1). Petitioners argue that these same circumstances also raise a substantial and material question of fact as to whether WCI filed multiple applications in violation of Section 21.901(d)(2) of the Commission's Rules, 47 C.F.R. § 21.901(d)(2), also known as the "one-to-a-market" rule:

> (1) Bruce Merrill's relationship as the father of Walter Merrill, President, co-director, and 100% stockholder of WCI;
>
> (2) Bruce Merrill's involvement in the initiation, preparation, payment and filing of WCI's applications, as well as the applications of the other fifteen applicants;
>
> (3) technical and other similarities of WCI's applications to the "cookie cutter" applications of the other fifteen applicants;
>
> (4) similarities in the articles of incorporation of WCI and the other fifteen applicants and the fact that certain individuals participated in the incorporation of all of these applicants;
>
> (5) Bruce Merrill's involvement in obtaining identical financing arrangements for WCI and the other fifteen applicants; and
>
> (6) the "Letter of Understanding" between WCI and Merrill which states that Merrill will provide programming services to WCI if WCI is a successful applicant, in consideration for the pre-filing services performed by Bruce Merrill.[3]

The Committee for Fair MMDS Lotteries also maintains that WCI violated the affiliation disclosure requirement of Section 21.900 of the Commission's Rules, 47 C.F.R. § 21.900, by failing to submit a statement disclosing the familial relationship between Walter Merrill and Bruce Merrill, WCI's intended or likely subscriber.

3. In its Replies, WCI argues that an evidentiary hearing is unnecessary to determine whether it violated the Commission's real party-in-interest and one-to-a-market rules because all relevant facts are before the Commission and are undisputed. WCI further argues that the record does not support Petitioner's allegations that WCI violated the real party-in-interest and one-to-a-market rules.

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[1] The fifteen other applicants are B. F. Investments, Inc. (renamed HiSol Limited Partnership), Champion Industries, Inc., Fortuna Systems Corp., Line of Site, Inc., Mettler Communications, Inc., Microwave Video Services, Inc., Multi-Micro, Multi-Point Television Distributors, Inc., MWTV, Inc., Paul Communications, Inc., Presco Corporation, Stephen Communications, Inc., Video/Multipoint, Inc., Virginia Communications, Inc., and Wireless Services, Inc.

[2] Bruce Merrill is Chairman of the Board of Directors and 100% shareholder of Merrill Communications, Inc. (MerrillCom). "Merrill" will be used herein to refer to either Bruce Merrill or MerrillCom.

[3] Similar "Letters of Understanding" were filed by the other fifteen applicants.

DISCUSSION

4. *Hearing Request.* To obtain an evidentiary hearing, parties challenging an application must satisfy the two-step test established in Section 309(d) of the Communications Act of 1934, as amended. As a threshold matter, Section 309(d)(1) provides that a petition to deny must "set forth specific allegations of fact sufficient to show... that a grant of the application would be *prima facie* inconsistent with the public interest, convenience, and necessity." 47 U.S.C. § 309(d)(1). If the Commission determines that a *prima facie* case has been made, then, and only then, must the Commission take the second step and determine whether a substantial and material question of fact has been presented. 47 U.S.C. §§ 309(d)(2) and (e). If the Commission finds that no substantial or material question of fact has been presented, no evidentiary hearing need be held. 47 U.S.C. § 309(d)(2). The Court of Appeals for the District of Columbia Circuit has reaffirmed this two-step process for determining the sufficiency of a petition to deny requesting an evidentiary hearing. *See, e.g., Astroline Com. Co. Ltd. Partnership v. FCC,* 857 F.2d 1556, 1561 (D.C. Cir. 1988) (*Astroline)*; *Gencom, Inc. v. FCC,* 832 F.2d 171, 180-81 (D.C. Cir. 1987) (*Gencom)*; *Citizens for Jazz on WRVR, Inc. v. FCC,* 775 F.2d 392, 394 (D.C. Cir. 1985) (*Jazz).*

5. The Commission must perform the *prima facie* inquiry on the basis of the petition to deny and supporting affidavits alone and on the assumption that the specific facts set forth by the petitioner are true. *Id.* In the instant case, the *prima facie* showing has been made in each of the petitions because the Commission has determined that an application will be dismissed as against the public interest, convenience and necessity if it finds that an applicant failed to disclose the real party-in-interest or violated the one-to-a-market rule. *See, e.g., United American Telecasters, Inc. v. FCC,* 801 F.2d 1436 (D.C. Cir. 1986), *cert. denied,* 107 S. Ct. 2182 (1987); *David Laustsen and Broadcast Data Corp.,* 3 FCC Rcd 2053 (Comm. Car. Bur. 1988); *KIST Corp.,* 99 FCC 2d 173 (Rev. Bd. 1984), *aff'd as modified,* 102 FCC 2d 288 (1985), *aff'd sub nom.; KOWL, Inc.,* 49 FCC 2d 962, 964 (Rev. Bd. 1974).

6. Having found that the petitions comport with the requirements of Section 309(d)(1), we now must determine whether a substantial and material question of fact has been raised by Petitioners. [4] In making this determination, the Commission must consider the totality of the evidence presented (*i.e.,* the evidence offered in rebuttal, the applications and other matters the Commission may officially notice, in addition to petitioner's evidence). *Astroline,* 857 F.2d at 1561; *Gencom,* 832 F.2d at 181; *Jazz* 775 F.2d at 394. The evidence before us is sufficient for us to make an informed decision on the merits of Petitioners' allegations without engaging in a further fact-finding process. The material facts underlying the asserted real party-in-interest and one-to-a-market rule violations in this case are uncontroverted. Moreover, as the Commission noted in *Virginia Communications, Inc.,* 2 FCC Rcd 1895, 1900 (1987) (*VCI),*" petitioner[s] and respondents alike have had more than sufficient opportunities to advance their respective arguments." In short, Petitioners have not raised any substantial and material questions of fact.

7. *Real Party-in-Interest Issue.* The test for determining whether a party is a real party-in-interest[5] is "whether that party has an ownership interest in the application or will be in a position, actually or potentially, to control the operation of the station." *San Joaquin Television Improvement Corp.,* 2 FCC Rcd 7004, 7008 (1987); *KOWL, Inc.,* 49 FCC 2d 962. There is no evidence that Bruce Merrill has any ownership interest in WCI's applications. *VCI* at 1898. Furthermore, none of the circumstances presented by Petitioners (*e.g.,* Bruce Merrill's relationship as the father of Walter Merrill, Bruce Merrill's assistance with WCI's applications, and the Letter of Understanding), either individually or collectively, place Merrill in an actual or potential position to control the operation of WCI's MMDS stations. *VCI* at 1898-99. Consequently, we cannot find a violation of the Commission's real party-ininterest rule.

8. *One-to-a-Market Issue.* The evidence presented is also insufficient to find a violation of the Commission's one-to-a-market rule. [6] Petitioners do not "contend that Bruce Merrill has in WCI, either directly or indirectly, any of the interests specified by the plain language of Section 21.901(d)(2). Nevertheless, Petitioners argue that Bruce Merrill holds a "cognizable interest" in WCI "similar" to that of an "officer or director" and to that of a "beneficiary." First, the evidence does not demonstrate that Bruce Merrill holds in WCI an interest "similar" to that of an officer or director, particularly in light of WCI's rebuttal that "no one but Walter Merrill is or will be in a position to actually or potentially control the operation of WCI's proposed MMDS facilities." Second, although Merrill stands to benefit in a broad sense due to the programming arrangement in the Letter of Understanding between WCI and Merrill, this benefit is no different from the benefit that every other customer/programmer of WCI will receive. As the Commission found in *VCI,* "Such

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[4] A "substantial" question for this purpose is a question which "arouses sufficient doubt on the point that further inquiry is called for." *Jazz,* 775 F.2d at 395.

[5] Section 21.13(a)(1) of the Commission's Rules requires an applicant for a license to "[d]isclose fully the real party (or parties) in interest, including. . . a complete disclosure of the identity and relationship of those persons or entities directly or indirectly owning or controlling (or both) the applicant." 47 C.F.R. § 21.13(a)(1).

[6] At the time the subject applications and the related Petitions to Deny were filed, Section 21.901(d)(2) provided:

> The E-group channels will be assigned to a single applicant in each area and the F-group channels will be assigned to a different applicant in that area. In such areas, each applicant may submit only a single application for either the E-group channels or the F-group channels but not both. The partners, owners, trustees, beneficiaries, officers, directors or stockholders holding more than one percent of an entity's stock, or any other person or entity holding a similar cognizable interest in the applicant for, or the licensee of, one group of channels in any area, shall not have a cognizable interest in the applicant for, or licensee of, either the same group, or the other group of channels in the same area.

47 C.F.R. § 21.901(d)(2).

ordinary customer interests cannot be construed as a cognizable interest in an MMDS application for § 21.901(d)(2) purposes." 2 FCC Rcd at 1899.

9. *Affiliation Disclosure Issue.* Section 21.900 requires an applicant to disclose at the time of filing "any affiliation or relationship to any intended or likely subscriber or program originator." The terms "affiliation" and "relationship" have been defined by the Commission, for purposes of Section 21.900, as "any financial or business relationship whatsoever by contract or otherwise, directly or indirectly, between the carrier and the subscriber, excepting only the carrier-user relationship." *MDS Report and Order,* 45 FCC 2d 616, 618 (1974). Under this definition, WCI was not required to disclose the familial relationship between Walter Merrill and Bruce Merrill. The Committee does not allege that WCI failed to disclose a financial or business relationship. Therefore, we cannot find that WCI violated Section 21.900 of the Rules.

CONCLUSION

10. We find that Petitioners have not raised a substantial and material question of fact requiring designation for hearing as to whether WCI violated the Commission's real party-in-interest or one-to-a-market rules. The evidence before us is sufficient for us to make an informed and reasoned decision on these issues. Based on this record, we find no violation by WCI of the Commission's real party-in-interest and one-to-a-market rules. We also find no violation of the Commission's affiliation disclosure rule.

11. WCI is reminded that, in *VCI,* the Commission imposed a condition on any MMDS authorization issued to WCI requiring WCI to hold the service out to the public without unreasonable preference or discrimination for 60 days from the date its formal tariffs are effective. "During that 60 day period, [WCI] may not accept Bruce Merrill, MerrillCom, or any entity in which Bruce Merrill is affiliated as a customer/programmer." *VCI* at 1900.

12. *Ordering Clause.* Accordingly, IT IS ORDERED that the petitions filed by the Committee for Fair MDS Lotteries, United Cable Television Corporation and Rockford/Park Cablevision, Inc. to deny the applications of Walter Communications, Inc. at Boise, Idaho, Rockford, Illinois and Atlantic City, New Jersey ARE DENIED.

13. This order is issued pursuant to Section 0.291 of the Commission's Rules, 47 C.F.R. § 0.291, and is effective on its release date. Petitions for reconsideration pursuant to Section 1.106 of the Commission's Rules, 47 C.F.R. § 1.106, or applications for review pursuant to Section 1.115 of the Commission's Rules, 47 C.F.R. § 1.115, may be filed within thirty (30) days of the date of public notice of this order. *See* Section 1.4(b)(2) of the Commission's Rules, 47 C.F.R. § 1.4(b)(2).

FEDERAL COMMUNICATIONS COMMISSION

James R. Keegan
Chief, Domestic Facilities Division
Common Carrier Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 85-27

In re Applications of

LAMAR COMMUNICATIONS, INC. *et al.* File No. BPCT-840921KK

For Construction Permit for a new Television Station on Channel 35, Miami, Florida

ORDER

Adopted: November 15, 1991; Released: November 18, 1991

1. Before the Commission for consideration are a Joint Request for Approval of Settlement Agreements, filed July 31, 1991 by Miami Latino Broadcasting Corp. (Miami Latino), Lamar Communications, Inc. (Lamar), Yolanda Eden (Eden), Coral Way Broadcasting Corp. (Coral Way), Range Communications, Limited Partnership (Range), Grace Broadcasting Network, Inc. (Grace), Minority Broadcasting Company, Inc. (Minority), and First Latin Women Broadcasting, Inc. (First Latin);[1] a Petition for Leave to Amend filed July 31, 1991 and a Supplement filed August 8, 1991, a Correction to Amendment filed August 14, 1991, and a Supplement to Amendment filed August 27, 1991, by Miami Latino; and Consolidated Comments in Support of Joint Request for Approval of Settlement Agreements and Petition for Leave to Amend, filed August 29, 1991 by the Mass Media Bureau. On October 17, 1991 Miami Latino filed an Emergency Motion for Expedited Processing of Settlement.[2]

2. In a Decision, *Cuban American Limited*, 5 FCC Rcd 3781 (1990), the Commission granted Miami Latino's application. Minority Broadcasting, Lamar, Eden, Coral Way, Range, Grace and First Latin appealed the grant of Miami Latino's application. This proceeding was remanded by the Court of Appeals for consideration of the applicants' settlement agreements. *Minority Broadcasting Corp. v. FCC*, Case No. 90-1383 (D.C. Cir. August 22, 1991).

3. The settlement agreements contemplate the grant of Miami Latino's application, as amended, and the dismissal of the mutually exclusive applications now pending. Under the terms of the agreements, Miami Latino will pay Lamar $60,000; Eden $75,000; Coral Way $60,000; Range $30,000; Grace $140,000; Minority $160,000; and First Latin $70,000. The Mass Media Bureau supports approval of the settlement agreements. Each of the applicants submitted a statement under penalty of perjury, from one of their principals, affirming that their applications were not filed for the purpose of reaching or carrying out a settlement. It further appears that the settlements will serve the public interest by terminating this proceeding and expediting the institution of a new television service in Miami, Florida. Thus, the Joint Request complies with the provisions of 47 U.S.C. § 311(c) and 47 C.F.R. § 73.3525 which govern settlement agreements.

4. The Bureau also supports the Petition for Leave to Amend. In the amendment, Miami Latino proposes to substitute a new corporation, New Miami Latino Broadcasting Corporation (New Miami), as the applicant and proposed permittee. Jose M. Molina and Beverly Smith, who own 100 per cent of the voting stock in Miami Latino, will own 80 per cent of the voting stock and 20 per cent of the equity in New Miami. Kevin McMahan, a non voting owner in Miami Latino, will own 35 per cent of the equity in New Miami. William de la Pena, a new investor, will own 20 per cent of the voting stock and 45 per cent of the equity in New Miami. De la Pena has an option to acquire all of the stock in New Miami during a period from the grant of program test authority until six months after commencement of operations. Miami Latino has a reciprocal option to acquire de la Pena's 20 per cent voting and 45 per cent equity interests in the event that de la Pena seeks to exercise his option to acquire all of New Miami.

5. Under 47 C.F.R. § 310(d), the Commission must make a public interest finding regarding any transfer of control of a licensee or permittee. Therefore, any transaction whereby Miami Latino's principals, Molina and Smith, transfer control of Miami Latino or its successor, New Miami, to de la Pena, would require Commission consideration of de la Pena's qualifications pursuant to Section 310(d). *See generally David A. Davila*, 6 FCC Rcd 2897 (1991).

6. The amendment also withdraws Miami Latino's principals' integration proposals and changes Miami Latino's proposed transmitter site by designating an existing tower that had been previously proposed by Eden. The withdrawal of the integration proposals is consistent with *Ruarch Associates*, 103 FCC 2d 1178 (1986). The Bureau has determined that the site complies with all of the Commission's technical requirements except for the city coverage requirement. 47 C.F.R. § 73.685 requires that Miami Latino's predicted coverage contour cover all of Miami. Miami Latino states that it will cover 99.8 per cent of the area and 100 per cent of the population. The shortfall is *de minimis* and not a bar to designation of a new site. *Vela Broadcasting Co.*, 2 FCC Rcd 3663, 3665-66 (Rev. Bd. 1987); *Pappas Telecasting, Inc.*, 52 RR 2d 1495 (Rev. Bd. 1983).

7. ACCORDINGLY, IT IS ORDERED, That pursuant to 47 C.F.R. § 0.251(f)(11), the Joint Request for Approval of Settlement Agreements filed July 31, 1991, by Miami Latino Broadcasting Corporation, Lamar Communications, Inc., Yolanda Eden, Coral Way Broadcasting, Ltd., Range Communications, Limited Partnership, Grace Broadcasting Network, Inc., Minority Broadcasting, Inc., and First Latin Woman Broadcasting, Inc., IS GRANTED and the attached Settlement Agreements ARE APPROVED; that the Applications filed by Lamar Communications, Inc. (BPCT-840921KK), Yolanda Eden (BPCT-840921KM), Coral Way Broadcasting, Ltd. (BPCT-840921KN), Range Communications, Limited Partnership (BPCT-840921KR), Grace Broadcasting Network, Inc. (BPCT-840921KS), Minority Broadcasting Company, Inc. (BPCT-840921KT), and First Latin Woman Broadcasting,

Inc. (BPCT-840921KU), ARE DISMISSED; and that the Application filed by Miami Latino Broadcasting Corporation (BPCT-840921KJ) IS GRANTED.

8. IT IS FURTHER ORDERED, That the Petition for Leave to Amend filed July 31, 1991 and Supplemented on August 8, 1991 by Miami Latino Broadcasting Corporation IS GRANTED; and that the Amendment filed July 31, 1991, as corrected on August 14, 1991 and Supplemented on August 27, 1991, by Miami Latino Broadcasting Corporation IS ACCEPTED.

9. IT IS FURTHER ORDERED That the Emergency Motion for Expedited Processing of Settlement, filed October 17, 1991 by Miami Latino Broadcasting Corporation IS GRANTED to the extent indicated herein.

10. AND IT IS FURTHER ORDERED That the adjudicatory proceeding in MM Docket 85-27 IS TERMINATED.

FEDERAL COMMUNICATIONS COMMISSION

Robert L. Pettit
General Counsel

By John I. Riffer
Associate General Counsel

FOOTNOTES

[1] The Joint Request was filed on July 31, 1991. Thus, it is not subject to the restrictions in 47 C.F.R. § 73.3525, as amended, effective August 1, 1991. *Amendment of Section 73.3525*, 6 FCC Rcd 85 (1990), partial reconsideration granted, 6 FCC Rcd 2901, 2903 (1991).

[2] Consistent with the requirements of the orderly disposition of the Commission's business, we have given expedited consideration to the settlement agreements under consideration here.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 87-268

In the Matter of
Advanced Television Systems
and Their Impact upon the
Existing Television Broadcast
Service

NOTICE OF PROPOSED RULE MAKING

Adopted: October 24, 1991; Released: November 8, 1991

Comment Date: December 20, 1991
Reply Comment Date: January 20, 1992

By the Commission: Chairman Sikes issuing a separate statement.

I. BACKGROUND

1. This *Notice of Proposed Rule Making* (*Notice*) proposes policies and rules for implementing advanced television (ATV) service in this country.[1] It is the fourth in a series of Commission actions designed to refine and articulate a regulatory approach for ATV.[2]

2. In the *Second Inquiry*, we tentatively adopted certain principles that continue to guide our policies regarding ATV. These tentative decisions are that: 1) broadcast use of ATV technology would benefit the public; 2) the public can benefit from ATV technology most quickly if current broadcasters are permitted to implement ATV; 3) spectrum needed for ATV broadcasts will be obtained from the spectrum currently allotted to broadcast television; 4) current service to NTSC compatible receivers must continue, at least during a transition period; 5) only systems that utilize 6 MHz or less in broadcasting an ATV signal will be authorized; and 6) it is in the public interest not to retard the independent introduction of ATV in other services or on non-broadcast media."[3] In addition, in our *First Order* in this proceeding, we decided that a "simulcast" HDTV system -- *i.e.*, a system that employs design principles for ATV service independent of the existing NTSC technology, and that transmits the increased information of an ATV signal in a standard 6 MHz channel as used in the current television plan -- will allow for ATV introduction in the most non-disruptive and efficient manner.[4]

3. In 1987 we established the Advisory Committee on Advanced Television Service (Advisory Committee) to study and make recommendations on the technical, economic and public interest issues pertaining to the introduction of ATV.[5] The Advisory Committee has produced four Interim Reports on issues relating to ATV. It is currently directing the testing of six proponent systems and will ultimately make a recommendation to the Commission regarding their performance.[6]

4. This *Notice* does not address questions concerning the technical standard for terrestrial ATV service. That issue will be covered in a subsequent *Notice of Proposed Rule Making*. This *Notice* proposes a tentative plan for ATV terrestrial broadcast implementation. We seek comment on the following fundamental aspects of this plan: (1) who should initially be eligible for ATV frequencies; (2) how we should allot and assign ATV channels to eligible applicants; (3) how we should resolve certain spectrum issues involving the noncommercial reserve, low

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[1] ATV refers to any television technology that provides improved audio and video quality or enhances the current television broadcast system. The existing broadcasting system is referred to as NTSC, after the National Television Systems Committee, an industry group established in 1940 to develop technical standards for television broadcasts and which reconvened in 1950 to develop technical standards for adding color to the monochromatic standards.

The term "ATV" embraces both High Definition Television (HDTV) and Enhanced Definition Television (EDTV). HDTV systems aim to offer approximately twice the vertical and horizontal resolution of NTSC receivers and to provide picture quality approaching that of 35 mm film and audio quality equal to that of compact discs. "Simulcast" HDTV systems use design principles independent of existing NTSC technology. They are not receivable on conventional NTSC television sets. EDTV refers to systems that provide limited improvements over NTSC. EDTV signals may be receivable on current NTSC television receivers, in either the current 4: 3 standard or 16: 9 "letter box" aspect ratio formats. (The aspect ratio of a television picture is the width of the display relative to its height.) As we have stated, we do not envision adopting an EDTV standard, if at all, prior to reaching a decision on an HDTV standard. *First Report and Order*, 5 FCC Rcd 5627, 5627 (1990) (*First Order*).

[2] *See Notice of Inquiry*, 2 FCC Rcd 5125 (1987) (*First Inquiry*); *Tentative Decision and Further Notice of Inquiry*, 3 FCC Rcd 6520 (1988) (*Second Inquiry*); *First Order*, *supra*.

[3] *Second Inquiry*, 3 FCC Rcd at 6521.

[4] *See infra* Section V. A.

[5] The Advisory Committee is comprised of industry leaders of diverse viewpoints. *First Order*, 5 FCC Rcd at 5627.

[6] The six systems are proposed by four proponents: Advanced Compatible Television (ACTV) and Advanced Digital Television (ADTV) proposed by the Advanced Television Research Consortium; Narrow MUSE proposed by the Japan Broadcasting Corporation (NHK); DigiCipher and the ATVA Progressive System proposed by the American Television Alliance; and Digital Spectrum Compatible HDTV proposed by Zenith Electronics Corporation/AT&T. ACTV is an EDTV system, Narrow MUSE is an analog system, and the remaining four are digital systems. Fourth Interim Report of the FCC Advisory Committee on Advanced Television, at 4 (Fourth Interim Report). In November 1990, the Advisory Committee and the FCC entered into agreements with the Advanced Television Test Center (Test Center) and the Cable Television Laboratories (CableLabs), whereby the Test Center and CableLabs will serve as the testing fora for the proponent ATV systems. Additional video tests will be conducted at the Advanced Television Evaluation Laboratory (ATEL) in Ottawa, Canada, and audio tests will be conducted by Westinghouse Science and Technology Center. Testing is expected to be completed by early summer of 1992.

power and translator stations, and broadcast auxiliary services; (4) how we should regulate the "conversion" from NTSC to ATV; and (5) whether we should require some transitional simulcasting in ATV and NTSC during the conversion period. We discuss each of these questions and proposed solutions in turn.

II. ELIGIBILITY AND RELATED ISSUES

A. Initial Eligibility

5. As we have previously stated, our objective in this proceeding is to effect a major technological improvement in television transmission by allowing broadcasters to implement ATV.[7] Our goal is "not to launch a new and separate video service." [8] Thus, in order "to preserve and improve existing broadcast service and the benefits that this service delivers to the public," we have generally proposed restricting initial eligibility for ATV frequencies to existing broadcasters.[9]

6. We continue to believe that the public interest would best be served by limiting the pool of initial ATV applicants to existing broadcasters. First, existing broadcasters have invested considerable resources and expertise in the present system and represent a large pool of experienced talent. Through their support of the Test Center, they are also actively supporting the testing of ATV technologies. [10] As we have previously stated, given the risks inherent in ATV, existing broadcasters' continued involvement appears to be the most practical and expedient way to bring improved ATV television service to the American public.[11] Second, conversion to ATV represents a major change in broadcast technology nationwide. We believe that it would increase the potential for disruption to the viewing public if a technological change of this magnitude were accompanied by a change in the ownership structure of the entire television broadcasting industry. Initially restricting eligibility for ATV frequencies to existing broadcasters thus would appear to serve the public interest by hastening and smoothing the transition to ATV transmission. Finally, we stress that our award of an additional 6 MHz channel to existing broadcasters would be interim in nature only, so that broadcasters would have to surrender one of their 6 MHz channels after "conversion" to ATV.[12]

7. It is still our tentative view[13] that restricting eligibility to existing broadcasters is legally permissible and consistent with the Supreme Court's decision in *Ashbacker Radio Corp. v. FCC*.[14] In that case, the Supreme Court held that the Commission is required under Section 309 of the Communications Act [15] to give comparative consideration to all *bona fide* mutually exclusive applications. In so holding, however, the Court did not preclude the Commission from establishing threshold qualification standards that must be met before applicants are entitled to comparative consideration."[16] Indeed, in *United States v. Storer Broadcasting Co.*, [17] the Court held that, in the context of a rule making proceeding, the Commission:, may establish eligibility standards that applicants must meet in order to receive comparative consideration. [18] Consistent with case law, we have restricted eligibility on many occasions to particular classes or entities. As an example, the telephone industry's resources and expertise led us to restrict eligibility for a block of cellular telephone spectrum to wireline carriers for a period of years.[19] We have also held that in appropriate circumstances we can adopt threshold standards that limit eligibility to a class of one.[20]

8. We propose to include in the class of existing broadcasters who would initially be eligible for ATV channels: (1) all full-service television broadcast station licensees, (2) permittees authorized as of the date of adoption of this *Notice*, and (3) all parties with applications for a construction permit on file as of the date of adoption of this *Notice* who are ultimately awarded full-service television broadcast station licenses.[21] We believe that defining the class in this fashion will best serve the public interest. Having determined that incumbent broadcasters would be eligible initially for ATV frequencies, we have delineated the class of initially eligible ATV applicants to include these incumbent broadcasters, as well as those parties that are in the process of obtaining NTSC authorizations or licenses and have invested resources in reliance on our existing licensing scheme. We ask interested parties to comment on this proposal. We also seek comment on

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[7] *Second Inquiry*, 3 FCC Rcd at 6537.

[8] *Second Inquiry*, 3 FCC Rcd at 6537.

[9] *Second Inquiry*, 3 FCC Rcd at 6537-38.

[10] *See generally* Second Interim Report of the FCC Advisory Committee on Advanced Television Service at 3 (April 26, 1989) (Second Interim Report).

[11] *Second Inquiry*, 3 FCC Rcd at 6537. *See generally United States v. Storer Broadcasting Co.*, 351 U.S. 192 (1956) (hearing requirement of 47 U.S.C. § 309 does not limit the Commission's power to promulgate rules setting license eligibility criteria).

[12] *See infra* Section V. B.

[13] *Second Inquiry*, 3 FCC Rcd at 6537-38.

[14] 326 U.S. 327 (1945).

[15] 47 U.S.C. § 309.

[16] *Ashbacker Radio Corp. v. FCC*, 326 U.S. at 333 n. 9 (suggesting permissibility of cut-off rules).

[17] 351 U.S. at 202-205.

[18] *See also Public Utilities Commission of California v. FERC*, 900 F.2d 269 (D.C. Cir. 1990) (Ashbacker doctrine does not apply to two-track approach for certification applications).

[19] *An Inquiry Into the Use of the Bands 825-845 MHz and 870-890 MHz for Cellular Communications Systems; and Amendment of Parts 2 and 22 of the Commission's Rules Relative to Cellular Communications Systems*, 86 FCC 2d 469, 483 (1981), *modified*, 89 FCC 2d 48, 69-77 (1982) (further limiting duration of set aside), *further modified in Amendment of the Commission's Rules to Allow the Selection from Among Mutually Exclusive Competing Cellular Applications Using Random Selection or Lotteries Instead of Comparative Hearings*, 98 FCC 2d 175, 194-98 (1984) (reaffirming set aside, but redefining end of set aside period in each cellular market), *modified on other grounds*, 101 FCC 2d 577 (1985).

[20] *See, e.g., Amendment of the Commission's Rules Regarding Modification of FM and TV Authorizations to Specify a New Community of License*, 4 FCC Rcd 4870 (1989), *recon. granted in part and denied in part*, 5 FCC Rcd 7094 (1990); *Establishment of Procedures to Provide a Preference to Applicants Proposing an Allocation for New Services*, 6 FCC Rcd 3488 (1991) (adopting rules giving a dispositive "pioneer's preference" for new or innovative communications service).

[21] For the sake of brevity, we hereinafter refer to the class of those initially eligible for ATV frequencies as "existing broadcasters" or "existing NTSC licensees."

whether we should include within the class of eligible ATV applicants, those parties who have a petition for a new television allotment pending on the adoption date of this *Notice*, whose allotment petition is granted, and who are subsequently awarded a construction permit to use the NTSC channel. Parties with such pending allotment petitions may have already expended significant resources in prosecuting their petitions. We are thus of the tentative view that we should also permit these parties, should they attain permittee status, to participate fully in the transition to ATV. [22] If we do not award such a party a television construction permit as a result of a subsequent comparative case, we ask whether the actual grantee in such a proceeding (even though it had no pending petition or application on file as of the adoption of this *Notice)*[23] should be entitled to an ATV assignment. We also seek comment on whether, once the initial class of eligible applicants has been assigned ATV frequencies, we should attempt to assign an ATV frequency to parties outside this class who were authorized to construct NTSC facilities in the interim period after adoption of this *Notice*.[24]

9. In order to ensure a smooth transition to ATV technology, we also propose to suspend application of the television multiple ownership rules, 47 C.F.R. § 73.3555, for ATV spectrum on a limited basis. These rules prohibit the award of licenses for TV broadcast stations that result in an applicant directly or indirectly owning, operating or controlling (1) two TV stations with overlapping grade B contours, (2) more than 14 television stations, or 12 stations that are not minority controlled, nationwide or (3) television stations which have an aggregate national audience reach exceeding 30 percent, or which reach exceeds 25 percent and are not minority-controlled.[25] We propose to permit existing licensees that are awarded an additional ATV channel to hold both their NTSC and ATV licenses, even though their signals overlap, and to permit group owners to hold both NTSC and paired ATV channels, even though nationwide ceilings are exceeded, until such time as existing licensees are required to convert to ATV service exclusively. [26] We seek comment on this proposal.

B. Unrestricted Eligibility

10. Once ATV allotments for existing broadcast operations are made, we see no reason to continue limiting eligibility for ATV frequencies. We thus propose at that point to permit any qualified party to file a petition for rulemaking to modify the ATV allotment table so as to add additional ATV channels where they are technically feasible. [27] We also propose to permit any qualified applicant, not just existing broadcasters, to apply for an ATV frequency after it is determined that a given NTSC licensee has failed to construct an ATV facility or failed to apply for authority to construct within the required time, and is thereby leaving an allotment vacant. [28] Similarly, ATV licensees would be subject to competing applications filed during the appropriate renewal window. We propose to issue ATV licenses for periods concurrent with the license of the associated NTSC station. [29] In this way, once the transition to ATV technology had been completed, eligibility for ATV frequencies ultimately would become unrestricted. We seek comment on these proposals for opening up eligibility once initial ATV allotments are made.

C. Application and Construction Periods

11. In keeping with our goal of expediting delivery of ATV service to the American public, we propose to limit the period of time during which existing broadcasters would have the right to apply for a particular ATV channel. Specifically, we propose to give existing broadcasters three years from the time that an ATV allotment table is adopted to apply for a construction permit for an ATV channel. After that time, existing broadcasters would forfeit their priority status, and ATV channels would be opened to all qualified applicants. We tentatively conclude that three years is long enough to permit stations to arrange any necessary financing and to plan their ATV facilities, but is not so long as to unduly compromise our desire to minimize delays in bringing ATV service to the public. We seek comment on this proposal.

12. We also tentatively conclude that we should award existing broadcasters an additional license for the ATV channel, in lieu of treating the addition of an ATV channel as a major modification to the NTSC license. Dual licensing would simplify enforcement and administration of our rules. We seek comment on this tentative conclusion. We also seek comment, however, on whether there may be competing benefits in treating the addition of an ATV channel as a major modification to an existing broadcaster's license.

13. In the event we adopt a dual licensing scheme, we would propose not to permit an ATV license awarded to an existing NTSC licensee to be transferred independently of the associated NTSC license. As we previously stated, we are awarding existing broadcasters an additional broadcast channel to permit them to implement the technological advances that ATV can bring to the American public. Once this technological transition is accomplished, we expect that broadcasters will surrender one of these two channels. It would defeat both the primary purpose of

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[22] There are also parties seeking to obtain new licenses and who have requests pending for waiver of the current freeze on television broadcast applications in major markets. We are of the tentative view that such parties would be eligible for ATV channels, if their waiver requests are granted, and if they are subsequently awarded NTSC authorizations.

[23] For example, it is possible that a party with an allotment petition pending as of the date of this *Notice* may subsequently succeed in having a new channel allotted to a community, apply for that channel, and then be successfully challenged by another applicant for that channel.

[24] We are proposing to cease issuing new NTSC licenses once the assignment of ATV channels to the class of initially eligible applicants is complete. *See infra* Section V. A.

[25] 47 C.F.R. § 73.3555 (a)(3), (d)(1), (d)(2).

[26] *See infra* Section V.

[27] We cannot at this time estimate the number of such additional allotments which may be possible, although they would be most likely to occur in mid-size and smaller markets.

[28] *See infra* Section II. C, V. A.

[29] *See infra* Section II. C. *Cf.* 47 C.F.R. § 74.15(b) (auxiliary broadcast licenses issued for a period running concurrently with the license of the associated broadcast station with which it is licensed).

restricting initial eligibility -- to permit television broadcasters to implement a major technological improvement -- as well as jeopardize our plan for the most efficient use of spectrum if we were to permit the independent transfer of one or the other of an existing broadcasters' NTSC and ATV licenses. [30] We seek comment on these initial views. We also tentatively conclude that (1) an applicant for an ATV construction permit should lose its initial eligibility if its NTSC license is not renewed or is revoked while its ATV application is pending, [31] and (2) if either the broadcaster's NTSC or ATV license is revoked or not renewed, the remaining license would be automatically revoked. We seek comment on these tentative conclusions.

14. Our rules currently require that holders of broadcast station construction permits either build their facilities within two years from the date of issuance of the permit, or forfeit the permit.[32] We believe that a similar construction time limit is necessary in the case of ATV to ensure that assigned spectrum does not lie fallow for an inordinate period of time. Such a restriction would appear to apply logically to existing broadcasters that receive ATV permits, as well as to other qualified parties that may later receive ATV permits. We thus seek comment on whether we should extend our existing rules regarding the period of construction and forfeiture of construction permits to ATV permittees. In so doing, we note that preliminary information appears to indicate that a three-year application and two-year construction period will permit broadcasters sufficient time to begin transmission in ATV in the vast majority of cases. [33] We also ask interested parties to comment on whether we should apply our policies regarding extensions of NTSC construction permits to ATV permits, including the policy that inadequate finances will not justify an extension of time.[34]

III. INITIAL ASSIGNMENT OF ATV CHANNELS

15. The *Second Inquiry* explored in general terms the various means by which we might assign particular ATV channels to qualified applicants.[35] Based on the additional insights we have since gained regarding ATV technologies, and the approach towards ATV implementation we are developing herein, we seek additional comment on the general policies that should guide our resolution of this issue and on the specific means by which we might assign ATV frequencies.

A. Assignment of Particular Channels

16. In keeping with our current policy of allotting broadcast channels to particular communities, we propose to allot ATV channels to each community of license currently listed in the Table of Allotments for television frequencies.[36] For purposes of administering this proceeding, we propose to treat all ATV channels as equivalent. Provided that there are sufficient channels available to accommodate all existing licensees, applications for ATV channels within a market will not be considered mutually exclusive.[37] We seek comment on this proposed general approach to allotments and assignments.

17. We also must decide how to assign particular channels to existing broadcasters. We explore two basic alternatives below and invite interested parties to comment on them or on any other options they wish to suggest.

1. Table of Allotments

18. The first assignment approach would be to formulate a Table of Allotments which not only allots ATV channels to each community, but also randomly matches particular ATV channels to existing NTSC channels listed on the table. The Table would thus consist of paired NTSC-ATV allotments designated for service to a given community. We are of the initial view that such random

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[30] *See supra* Section II. A. Where an existing broadcaster forfeits initial eligibility by failing to apply for or construct an ATV facility within the required time, however, other public interest considerations necessitate opening up eligibility for what would have been an associated ATV channel to a different party. *See supra* Section II. B.

[31] *Cf.* 47 C.F.R. § 74.600 (auxiliary broadcast license issued only to a television broadcast station, network, low power or television translator station).

[32] 47 C.F.R. §§ 73.3598, 73.3599.

[33] A preliminary study submitted by CBS projects that stations in smaller markets will be slower to construct ATV facilities than those in larger markets. The study projects that stations in the ten largest markets will begin building an ATV facility in Year 1, and that by Year 5 stations in all markets, and serving 98% of all television households, will have begun actual construction of ATV facilities. High Definition Television: Transition Scenario for TV Stations: A CBS Work-in-Progress (Oct. 23, 1990 Preliminary Results), at Figure 11 (CBS Study), Attachment B to Implementation Subcommittee, Fourth Interim Report to the FCC Advisory Committee on Advanced Television Service (IS-0617) (Mar. 7, 1991) (Implementation Subcommittee Fourth Report).

For the convenience of commenting parties, all reports of the Commission staff and of the Advisory Committee, its subcommittees, or other subgroups, as well as other unpublished papers cited herein, are listed in Appendix B. All documents in Appendix B have been made part of the docket in this proceeding and are available in the Commission's public reference room. Copies are also available, for a fee, from the Commission's independent copy contractor, Downtown Copy Center, 1114-21st Street, NW, Washington, D.C. 20036, (202) 452-1422.

[34] *Revision of Application for Construction Permit for Commercial Broadcast Station (FCC Form 301)*, 50 RR 2d 381, 382 (1981).*See generally Amendment of Section 73.3598 and Associated Rules Concerning the Construction of Broadcast Stations*, 102 FCC 2d 1054 (1985).

[35] *Second Inquiry*, 3 FCC Rcd at 6538-39.

[36] As is currently the case, we would retain the right to modify the Table of Allotments containing the new ATV allotments if changed circumstances necessitate such a revision.

[37] We have used a similar approach to assign orbital slots to already qualified applicants in the domestic satellite service, *see, e.g., Assignment of Orbital Locations to Space Stations in the Domestic Fixed-Satellite Service*, 3 FCC Rcd 6972, 6972 (1988), and the direct broadcast satellite service, *see, e.g.*, 47 C.F.R. § 100.13(b).*See also Amendment of Parts 2 and 22 of the Commission's Rules to Allocate Spectrum in the 928-941 MHz Band and to Establish Other Rules, Policies, and Procedures for One-Way Paging Stations in the Domestic Public Land Mobile Radio Service*, 89 FCC 2d 1337, 1355, *on recon.*, 92 FCC 2d 631 (1982) and 93 FCC 2d 908 (1983).*Cf. Amendments to the Television Table of Assignments to Change Noncommercial Educational Reservations*, 59 RR 2d 1455 (1986), *recon. denied*, 3 FCC Rcd 2517 (1988) (authorizing intraband channel exchanges).

pairing of ATV and NTSC channels, in tandem with our proposed "use or lose" condition on construction permits, would promote early licensing and implementation of ATV, one of our underlying objectives in this proceeding. We tentatively find that this would be a practical, efficient and, under the circumstances, even-handed alternative for allotting particular ATV channels. Indeed, this approach effectively compresses two administrative steps, allotment to communities and pairing with particular licensees. [38] In addition, random pairing provides an equitable means of allotting particular channels. We seek comment on our initial view of this approach.

2. Allotment Table/First-Come/"Random Ranking"

19. A second option would be to follow a procedure of allotting ATV channels to a community and then assigning these channels to qualified ATV applicants. The first stage would entail formulating a Table of Allotments that would allot ATV channels to each community now listed in the Table of Allotments.[39] Next, we would permit existing NTSC licensees to apply for ATV channels in a given community on a first-come, first-served basis during an initial filing "window".[40] As part of their ATV applications for construction permits,[41] broadcasters would be required to list available ATV channels in order of preference. If more than one broadcaster applied for the same channel as its first choice, we would use a random assignment procedure ("random ranking") that would rank applicants so that the top-ranked applicant would be granted its first choice, and the next-ranked applicant its highest choice that would not conflict with the first-ranked applicant, and so on. Broadcasters that had not filed in the first window would be able to apply after the random ranking on a first-come, first-served basis for those channels that were still available.[42] If no random ranking were held in a market, we would open a second window to permit remaining initially eligible applicants to apply on a first-come, first served basis. Any applications by existing NTSC broadcasters would have to be filed within three years from the time that the initial filing window opened.

20. We believe that this option would encourage ready, willing, and able applicants to apply early for ATV channels. It would also tend to maximize the possibility that applicants' preferences for particular ATV channels would be accommodated, and thus might minimize the possibility of challenges to awards and the delays that such challenges would cause. We seek comment on this proposed approach.

3. Supplemental private negotiations

21. We recognize that the foregoing methods may not always give applicants the particular ATV channels they desire. To accommodate applicants' preferences to a greater extent, we also propose to permit parties, within the same market to negotiate among themselves after they have been awarded an ATV channel, on the condition that any proceeds from such an exchange would be used for operation of the station's ATV facility.[43] We believe that such a negotiating process would be an economically efficient means of permitting licensees to effectuate their preferences. We also seek comment on whether we should permit those applicants awarded ATV channels within adjacent markets to negotiate channel changes, but not changes in communities of license, among themselves.[44] We also ask interested parties to comment on whether we would eliminate or mitigate any inordinate delay possibly resulting from such negotiations by adopting our proposed requirement, discussed above, that an ATV facility be built within two years after award of the construction permit.

4. Financial qualifications

22. Two of the important objectives underlying our approach to ATV implementation are (1) that the benefits of this new technology be made available to the American public as soon as possible and (2) that the spectrum we have earmarked for ATV be used as efficiently as possible. We believe that both of these goals would be furthered if we were to minimize the possibility of an ATV channel being assigned to a broadcaster who is incapable or unwilling to promptly begin construction of an ATV facility or diligently carry it to completion. Such warehousing, even under a "use or lose" condition, could result in a significant delay before the channel is reassigned to a viable applicant. Moreover, if we permit parties awarded channels in a community to negotiate among themselves for different assignments, we may unintentionally encour-

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[38] Of course, existing broadcasters still must submit an application for a construction permit to use the paired ATV channel. Granting of this permit constitutes the official assignment. As discussed *supra*, Section II. C., we propose to permit existing broadcasters three years from the time of the pairing of ATV channels to submit their application for a construction permit.

[39] 47 C.F.R. § 73.606. In contrast to the option just above, this alternative would separate the administrative steps of allotment to community and assignment to a particular licensee. Such separation would allow us to resolve any requests for modification of allotments before actual assignments are made. This would eliminate the possibility of having to reassign channels if allotments were later modified.

[40] We have used this approach before, *e.g.*, in the 220-222 MHz private land mobile service. *Amendment of Part 90 of the Commission's Rules to Provide for the Use of the 220-222 MHz Band by the Private Land Mobile Radio Services*, 6 FCC Rcd 2356, 2364 (1991).

[41] We recognize that technical specifications may vary among channels. We propose to require parties to amend their applications to supply appropriate technical data to conform with the specific channel they are ultimately awarded.

[42] We have used a first-come, first-served approach in the FM service when a window period closes without the filing of an acceptable application. *Amendment of Sections 73.3572 and 73.3573 Relating to Processing of FM and TV Broadcast Applications*, 58 RR 2d 776 (1985).

[43] *Cf. Amendments to the Television Table of Assignments to Change noncommercial Educational Reservations*, 59 RR 2d 1455, 1464 (1986), *on recon.*, 3 FCC Rcd 2517 (1988), *related appeal pending, Rainbow Broadcasting Co. v. FCC*, No. 90-1591 (D.C. Cir. oral argument Sept. 30, 1991) (proceeds, if any, from noncommercial station's intraband exchange of channels with a commercial station should be used by noncommercial licensee in the operation of its station).

[44] For example, two stations in different communities may seek to exchange channels that are capable of being used in either community. Under our proposal, after an exchange, each station will remain licensed to serve its original community, but the channels assigned to them will be switched.

age the filing of speculative ATV applications. Such speculative applicants potentially could profit from trading channels desired by ready, willing, and able applicants.

23. We accordingly seek comment on whether we should adopt a financial qualification showing as a condition for awarding an ATV channel. Such a requirement could be imposed as a supplement to our establishing a deadline by which construction must be completed. We also seek comment on whether a financial showing should consist of an estimate of the cost of constructing and operating an ATV facility for three months, together with proof either of available assets sufficient to cover this estimate, or of a firm financial commitment from a lender sufficient to cover these costs. This showing would employ essentially the same standard now applied to applicants for new broadcast facilities.[45] Interested parties should also comment on whether such a requirement is likely to increase the time necessary to process applications for ATV construction permits, to the detriment of our goal of expediting delivery of ATV service to the public.

B. Assignment of a Channel

24. We expect that, for the most part, there will be sufficient spectrum for all ATV applicants. However, we recognize that a case conceivably may arise in which we cannot grant all initial eligible applicants an ATV channel assignment. In this event, there are several options we might pursue to determine which NTSC licensees would be entitled to an additional ATV channel.

25. First, in choosing among competing NTSC applicants, we might employ decisional criteria which would select those licensees capable of maximizing the number of households reached by the ATV signal or of bringing ATV service to the area most expediently. For example, we could use potential viewership or coverage area of the applicant's proposed ATV signal to determine entitlement to a channel. However, although this criteria would help bring ATV technology to the largest number of households, it would require projections of viewership or coverage area that might be difficult, if not impossible, to make or verify. An alternative strategy would involve combining a financial qualification rule, a first-come, first-served approach to awarding channels, and strict enforcement of the two-year period for constructing an ATV facility. Under this approach, an applicant demonstrating its financial ability to construct and operate an ATV channel. [46] would be entitled to apply for a channel on a first-come basis. The financial qualification requirement and a "use or lose" condition on construction permits would confine applications to those entities capable of building an ATV facility immediately, thereby furthering our goal of hastening delivery of ATV service to the public.

26. The second major option for selecting among existing broadcasters competing for insufficient ATV spectrum would be to conduct a lottery pursuant to 47 U.S.C. § 309(i) to determine which applicants are entitled to a channel assignment.[47] In the unlikely event a spectrum shortfall develops, it will probably be limited to major markets where numerous existing licensees will be vying for new ATV channels.[48] At that point, the Commission staff will already be hard-pressed to process channel assignments for all the other communities in the country where there is sufficient spectrum to accommodate all initially eligible applicants. Use of lotteries for markets where there is a spectrum shortfall would significantly speed the process of getting new ATV service to the public in those markets. Such cases would otherwise likely result in large, multiple-applicant comparative hearings which would cause lengthy delays, contrary to our goal of delivering ATV service to the public as quickly as possible. A lottery approach might thus be appropriate under these circumstances.[49]

IV. SPECTRUM ISSUES

A. Noncommercial Allotments

27. Our technical studies thus far indicate that, for the most part, we will be able to offer an additional 6 MHz of spectrum to existing stations for ATV without using vacant spectrum now reserved in specific communities for noncommercial stations. These studies show, moreover, that in the majority of cases, associating an additional 6 MHz ATV channel with these existing vacant noncommercial allotments will also be feasible. [50]

28. In addition, should problematic cases arise, it may be possible to engineer the ATV facility involved so as to permit an additional ATV allotment for the facility while

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[45] FCC Form 301, Section III.

[46] *See supra* Section III. A.

[47] Section 309 (i)(1) of the Communications Act authorizes the Commission to use the lottery procedures set forth in the remainder of that Section in situations where "there is more than one application for any initial license or construction permit which will involve any use of the electromagnetic spectrum." 47 U.S.C. § 309 (i)(1) (1982).

We note for the sake of clarity that we are here proposing use of a lottery only to determine which existing broadcasters would obtain an ATV channel in the event of a spectrum shortfall. We are not here proposing to change the procedures that may apply to applicants for an ATV channel available after the initial assignment of ATV channels is made. *See generally Amendment of the Commission's Rules to Allow the Selection from Among Competing Applicants for New AM, FM, and Television Stations by Random Selection (Lottery)*, 5 FCC Rcd 4002 (1990)(deciding to reform existing comparative hearing process in lieu of instituting lottery procedures for selecting among competing applicants for new AM, FM, and television stations).

[48] It is also possible that at the time of ATV conversion, *see infra* Section V, the elimination of NTSC broadcasts may also eliminate additional interference constraints and consequently make additional ATV frequencies available.

[49] *See generally* H. R. Rep. No. 97-765, 97th Cong., 2d Sess. 37 (1982).

[50] OET Technical Memorandum, FCC/OET TM89-1 (Dec. 1989), at 10-11, 65 and 66 (1989 OET Study). The studies conclude that with co-channel separations for ATV-ATV and ATV-NTSC stations of 100 miles, no UHF interference taboos, and 6 MHz of spectrum awarded on a non-contiguous basis, 96% of all "stations," including vacant noncommercial allotments, can be accommodated if we require adjacent channel stations to be separated by 60 miles or co-located; 99.6% of all "stations" can be accommodated if no adjacent channel separa-

avoiding interference.[51] We tentatively find that these studies mitigate previously expressed concerns of public broadcasting interests that the noncommercial reserve will be used for ATV assignments.[52] We also tentatively find that we will generally be able to associate ATV channels with vacant noncommercial allotments for noncommercial use. Our tentative conclusions assume, of course, that the transmission system ultimately selected can function within the spacings ultimately adopted and will not require spacings equal to those in effect for NTSC today. [53] We seek comment on these tentative findings.

29. The Commission's spectrum planning policy has traditionally taken into account the important role noncommercial stations play and the financial constraints they face in constructing and operating stations.[54] Our technical studies lead us to believe that we can continue this tradition within an ATV allotment scheme. We propose to use the noncommercial reserve for ATV service only as a last resort. However, in the exceptional case where it may be necessary to use a vacant noncommercial allotment to allow present delivery of ATV service, we propose to do so. We seek comment on this proposal and on the particular circumstances, such as lack of any other available channels or the existence of a ready, willing and able ATV applicant, which might justify using a vacant noncommercial allotment. Similarly, in the few cases where it would be impossible to allot ATV spectrum to vacant noncommercial allotments without precluding delivery of ATV service by an existing eligible applicant, we propose to allow that existing eligible applicant to use the spectrum for ATV. [55] We seek comment on this proposal.[56]

B. LPTV and Translator Services

30. Spectrum studies by the staff and the Advisory Committee confirm that it will be a challenge to provide 6 MHz of supplemental spectrum for ATV to all full-service licensees. 9 [57] While the extent to which the assignment of these new ATV channels may displace LPTV and translator stations is not fully known, it is likely that LPTV and translator stations will be displaced to some degree in the major markets.[58] For this reason, and to minimize the potential disruption to LPTV and translator service, we have instituted a freeze on new low power station applications in major urban markets.[59] It is less clear, however, whether in rural areas -- where there are fewer, or maybe no full-service stations -- the advent of ATV will mean widespread displacement of low power/translator stations.[60]

31. From the time we first authorized low power service, we stressed that we would permit low power service only as a secondary service, despite the public benefits

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tion is imposed. It also appears that the 4% of the new allotments that would violate 60-mile adjacent channel spacing would be located primarily in major markets with densely crowded frequency use, and where few, if any, vacant noncommercial allotments would exist. Increasing minimum co-channel separation distances beyond 100 miles conceivably decreases the number of vacant allotments that could be accommodated, however. For example, it is possible that such an increased separation could cause a "daisy chain" effect spreading from large, densely crowded markets to outlying regions, and which might eventually require deletion of a vacant noncommercial allotment in such an outlying region.

[51] We believe that the 4% of new allotments that would violate a 60-mile adjacent-channel separation requirement may be able to avoid causing or receiving interference by using engineering techniques such as directional antennas, shorter effective antenna heights or terrain shielding.

[52] *See, e.g.*, Comments of the Corporation for Public Broadcasting and the National Association of Public Television Stations, MM Docket No. 87-268 (filed Nov. 30, 1988) at 15 (CPB 1988 Comments); Comments of the Public Broadcasting Service and the National Association of Public Television Stations, MM Docket No. 87-268 (filed Nov. 30, 1988) at 17.

[53] Staff studies have assumed 100 mile co-channel spacings, and no UHF taboo spacings for ATV. These spacings are less than those in effect for NTSC today. 1989 OET Study, *supra;* 47 C.F.R. § 73.610 (current co-channel separation varies from 155 miles to 205 miles for UHF channels and from 170 miles to 220 miles for VHF channels, depending on which part of the country the stations are located in); 47 C.F.R. § 73.698 (current UHF taboo spacings of 20 to 75 miles).

[54] *See, e.g., Amendment of Section 3.606 of the Commission's Rules and Regulations,* 41 FCC 148 (1952); *Fostering Expanded Use of UHF Television Channels,* 2 FCC 2d 527, *modified on other grounds,* 3 FCC 2d 506, 509 (1966) (reserving channels for noncommercial educational use).

[55] In no case, however, would we use a vacant VHF channel allotment reserved for noncommercial purposes for commercial ATV. *See* P. L. 101-515, the Departments of Commerce, Justice, and State, the Judiciary and Related Agencies Appropriations Act, 1991 (102 Stat. 2136-37, Nov. 5, 1990) (no funds appropriated to the FCC may be used to diminish the number of VHF channel assignments reserved for noncommercial educational television stations).

[56] We also observe that under the proposed implementation plan, new noncommercial station applicants would be able to petition for rulemaking for an additional ATV allotment after the ATV Table of Allotments is adopted and would be able to seek a channel assignment for such new allotment. They also could apply for an ATV assignment in the case where an ATV permittee forfeited its assigned channel by not constructing within the required time. *See supra* Section II. C.

[57] Interim Report: Estimate of Availability of Spectrum for Advanced Television (ATV) in the Existing Terrestrial Broadcast Bands, FCC/OET TM 88-1 (1988 OET Study); 1989 OET Study, *supra;* Preliminary Analysis of VHF and UHF Spectrum Scenarios -- Part III, Advisory Committee, Planning Subcommittee Working Party 3, Doc. 0174 (June 1991).

[58] A low power station is a broadcast television facility with secondary service status that is authorized at maximum power levels lower than those of full-service television stations. Low power stations may retransmit the programs of a full-service station and may originate programming. Translators are low-power stations that do not originate programming and act only to retransmit the signals of a full-service station. 47 C.F.R. § 74.701 (a), (f).

[59] Public Notice, Notice of Limited Low Power Television/Television Translator Filing Window From April 29, 1991 Through May 3, 1991, Mimeo No. 12124 (released March 12, 1991).

[60] At the inception of low power service, the Commission anticipated that the dearth of full service stations in rural areas, together with our requirement that low power stations protect the Grade B contours of all fullservice stations, would result in most low power stations locating outside the top 50 markets. *An Inquiry Into the Future Role of Low-Power Television Broadcasting and Television Translators in the National Telecommunications System,* 51 RR 2d 476, 505 (1982) (*Low Power Service Order*) , *recon. granted in part on other grounds,* 53 RR 2d 1267, *recon. denied,* 95 FCC 2d 657 (1983), *aff'd sub nom. Neighborhood TV Company, Inc. v. FCC,* 742 F.2d 629 (D.C. Cir. 1984).

flowing from the diverse, locally responsive programming it could produce. Thus, low power stations may not interfere with full-service stations, and must yield to new full-service stations.[61] Although low power interests have argued that displacement of LPTV stations by ATV would contravene the Communications Act by reducing diversity, diversity is not the only criterion that we are bound to consider, or indeed, did consider when we authorized the low power service.[62] One of the other factors leading us to accord secondary status to the low power service was the spectrum demands of competing services, precisely the decisional factor motivating us today. [63] In addition, contrary to the arguments of low power interests, [64] displacement by a new ATV station would not violate the first amendment rights of LPTV licensees. [65]

32. We thus propose no change to the secondary status of LPTV and translator stations. They must yield to new ATV operations just as they would be required to yield to existing full-service operations. As part of our concern for the industry's development, however, we have previously modified our rules to permit a low power station displaced by a full-service station to file an application for a vacant channel in the same area without being subject to competing applications.[66] We propose to continue to afford this special treatment to low power stations displaced by new ATV assignments. We seek comment on our proposed approach to any displacement of LPTV and translator stations by new ATV channels.

C. Broadcast Auxiliary Services

33. Broadcast auxiliary spectrum is used generally by television stations to convey their signals on a point-to-point basis from fixed or mobile facilities. Stations use this spectrum for such purposes as studio-totransmitter links (STLs), and for *ad hoc* links between remote locations and the studio or transmitter.[67] We recognize that spectrum for auxiliary services associated with ATV will be limited because of the likely additional demand for such spectrum, at least in the early stages of ATV implementation, and because of the lack of readily available additional spectrum sources. We do not believe that additional spectrum should be made available for ATV auxiliary use at this time. We expect that some existing broadcasters will be able to operate auxiliary services for their additional ATV channel within the currently allocated broadcast auxiliary spectrum.[68] We also anticipate that licensees will be able to take better advantage of digital compression and other techniques to make optimum use of current spectrum, and/or use fiber optic or cable links for auxiliary purposes.[69] If broadcasters come to air much of the same programming originally produced in ATV format over both channels,[70] this in turn may reduce the need for dual auxiliary frequencies; a single STL could transmit programming to the transmitter site, where the programming would be processed specially for NTSC transmission. For the foregoing reasons, we tentatively conclude that we should not propose any additional spectrum allocations for broadcast auxiliary purposes at this time and we seek comment on this tentative conclusion.

V. CONVERSION TO ATV

A. The Future Role of NTSC

34. We envision ATV as an improved form of television that, if successful, will eventually replace existing NTSC. In order to make a smooth transition to this technology, we earlier decided to permit delivery of ATV on a separate 6 MHz channel. As we explained in the *First Order*, a "simulcast" system will transmit the increased information of an HDTV signal in a channel of a size -- 6 MHz -- equivalent to that used in the current television channel plan. We stated that this ultimately will minimize the amount of spectrum needed for HDTV service, once the eventually outmoded NTSC signal is surrendered. [71]

35. In order to continue to promote spectrum efficiency, we intend to require broadcasters to "convert" entirely to ATV --*i.e.*, to surrender one 6 MHz frequency and broadcast only in ATV once ATV becomes the prevalent medium. H [72] We believe that such a policy will help foster the development of ATV, permit us to consider how the surrendered channels could best be put to use, and help maximize the coverage areas of ATV stations.[73]

36. Should an existing broadcaster have forfeited its initial eligibility for an ATV channel (for example, by not applying for or building an ATV facility within the requisite time), we propose to allow it to switch directly to an ATV channel at the time of required conversion if there is an available frequency or if it is technically possible to use its existing NTSC frequency for this purpose.[74] We

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[61] *Low Power Service Order*, 51 RR 2d at 484, 486; 47 C.F.R. § 74.702(b).

[62] Comments of Channel America LPTV Holdings, Inc., MM Docket No. 87-268 (filed Nov. 30, 1988) at 4-5 (Channel America Comments).

[63] *Low Power Service Order*, 51 RR 2d at 481.

[64] Channel America Comments at 4-5, 8-9.

[65] *See National Broadcasting Co. v. United States*, 319 U. S. 190 (1943) (first amendment rights of applicant not abridged by denial of license on public interest basis); 47 U.S.C. § 307(b).

[66] *Low Power Television and Television Translator Service*, 2 FCC Rcd 1278 (1987); 47 C.F.R. § 73.3572(a)(2).

[67] *See generally* Advisory Committee, Planning Subcommittee, Fourth Interim Report at 5 (Planning Subcommittee Fourth Report).

[68] *See generally* Planning Subcommittee Fourth Interim Report at 12-14 (broadcast auxiliary spectrum is available in below top-30 markets if microwave paths carefully engineered, although scarcity is projected in top-30 markets).

[69] Planning Subcommittee Fourth Interim Report at 9-10. It is conceivable, for example, that digital compression techniques may be developed so that a single microwave channel can be used as an STL to transmit both an NTSC and an ATV program. It is also conceivable that cable or fiber optic links may be used for fixed, point-to-point transmissions, such as STLs or inter-city relays between stations.

[70] The issue of requiring simulcasting is discussed in Section VI, *infra*.

[71] 5 FCC Rcd at 5628.

[72] At this point, we intend to permit continued NTSC broadcasts only upon a showing of special circumstances.

[73] The continued presence of NTSC stations necessarily limits the coverage area of ATV stations in the same vicinity in congested regions. *See* Section V. C. *infra*.

[74] *But cf. infra* Section V. C.

also propose to cease issuing new NTSC licenses once we have completed the assignment of ATV channels to existing NTSC licensees. From that point forward, in order to begin effectuating the transition to ATV, we propose to issue new television broadcast licenses for ATV transmission only. In addition, once initial ATV assignments have been made, and spectrum is increasingly depleted, it will become progressively more difficult to make dual NTSC-ATV channel assignments. For this additional reason we believe it advisable to cease issuing NTSC licenses that, in order to have long-term viability, will have to be paired with an ATV frequency.[75] We seek comment on our proposed regulatory approach to the role of NTSC in implementing and converting to ATV.

B. Surrendering a Frequency

37. It is our tentative view that the public interest requires that we set a firm deadline or other triggering event for broadcasters to surrender their NTSC frequencies and convert entirely to ATV. Establishing a definite point by which conversion must take place will provide clear notice of this transition to the broadcast industry, the viewing public, and other potential users of the spectrum to be relinquished. We seek comment on this tentative conclusion, as well as on the underlying assumption that there may be other, superior uses for the spectrum to be surrendered.

38. We now consider how we should establish the date by which broadcasters must surrender one 6 MHz channel. In fixing an appropriate ATV conversion date, we are most concerned that sufficient numbers of consumers purchase ATV receivers by that point so as to justify discontinuance of NTSC broadcasts. In this regard, we note that the Advisory Committee is currently studying projected ATV receiver penetration rates.[76] Such studies are also taking into account the time and cost involved for broadcast stations to convert fully to ATV.[77] We ask interested parties to comment on the preliminary work done by the Advisory Committee on the conversion issue thus far, and to submit any additional or supplemental penetration analyses they believe are appropriate.

39. We believe that there are several ways in which a conversion date. 8for ATV could be selected. One option would use achievement of a specific nationwide penetration rate (defined as a percentage of households with ATV receivers) as the triggering event for ATV conversion, with all broadcast stations being required to convert to ATV transmission within a certain period of time (for example, three years) after a particular penetration rate was achieved. We seek comment on what the specific penetration rate should be under this option, and at what point after that rate is achieved we should require full-scale conversion to ATV.

40. We recognize, however, that use of a nationwide penetration rate as a conversion point for ATV conceivably may pose a hardship to stations in smaller or less affluent markets. In such cases, there might be fewer financial resources to permit either consumers to purchase receivers or stations to construct and equip an ATV facility. Indeed, the CBS study suggests that many stations in smaller markets will take longer to begin building and longer to finish constructing an ATV facility than major market stations.[78] We thus seek comment on whether we should modify the first option to require conversion for ATV only after a specific penetration rate is achieved on a market-by-market basis. Such an option would appear to better calibrate consumers' readiness to convert to ATV, and would probably result in stations in larger markets converting more quickly than those in smaller markets. On the other hand, such piecemeal conversion might adversely affect the availability of network or other nationwide ATV programming. Interested parties are invited to address the relative advantages and disadvantages of such a market-by-market approach. Comment is also solicited on what the appropriate penetration rate should be, and how we should assess when that rate has been achieved in a given market.

41. A final option would be to establish a firm date by which one frequency would have to be surrendered and the conversion to ATV completed. Such a date in itself would allow sufficient time for consumers to purchase new ATV receivers and adjust to this new transmission form. We believe that this option has the advantage of providing clear notice to licensees and to the public of the date by which conversion must take place. It would also be more efficient to administer than the other options discussed above because the Commission would not have to make determinations of nationwide or market penetration rates in scheduling alternative conversion dates. We seek comment on whether establishment of a date certain alone is an appropriate way to schedule ATV conversion, and if so, what factors and types of data we should take into account in setting the date, and what the specific conversion date should be.

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[75] *See infra* Section V. B.

[76] *See, e.g.,* Fourth Interim Report of the Working Party 5 on Economic Factors and Market Penetration of the Planning Subcommittee of the Advisory Committee on Advanced Television Service (Mar. 4, 1991), at 8 (PS WP5 Market Penetration Report). The report states that the Chairman of Working Party 5 believes that an "optimistic" view of ATV penetration -- *i.e.,* 40% penetration 10 years after 1% penetration is reached -- is merited. In this view," it remains likely that ATV home video players and ATV cable service will in fact precede the introduction of ATV terrestrial broadcasting, and even seed the market to the one percent penetration point before the ATV terrestrial service in inaugurated." PS WP5 Market Penetration Report at 7-8.

[77] The PS WP5 Market Penetration Report at 6. The report cites both a PBS study (projecting a cost for an ATV facility ranging from a low $1.7 million for pass-through of network programming on a low-band VHF station, to $12.3 million for full program origination capability on a UHF station) and the CBS Study, *supra,* projecting a $1.5 million cost for network pass-through and $11.6 million for total transmission/studio facility for the first stations that construct, and $741,000 for network pass through and $6.9 million for total plant construction for the last group of stations that move to ATV. CBS projects that the $11.6 million investment for the first 30 stations in the largest markets serving 31% of television households will occur over a period of five years. The CBS Study projects that the cost for stations in smaller markets starting construction of ATV facilities four years later, would fall to less than $8 million. *See generally* PBS Engineering: Preliminary HDTV Estimates (Oct. 1990)(PBS Study), Attachment C to Implementation Subcommittee, Fourth Report, *supra;* CBS Study, *supra.*

[78] CBS Study at 17 & Figures 11 and 12.

C. Switching Frequencies

42. It is conceivable that, after a period of time, stations may desire to switch their new ATV operations to their original NTSC channels.[79] Based on preliminary staff studies, it appears that ATV allotments may have spacing between ATV and NTSC co-channels shorter than spacing between ATV-ATV co-channels and NTSC-NTSC co-channels.[80] This technical constraint poses problems for a station switching its NTSC to its ATV channel and vice versa, unless all stations with co-channel facilities at less than the minimum ATVATV spacing distance in a given area switch together. Switching ATV and NTSC frequencies otherwise may result in ATV stations with permanently much smaller service areas.[81] In light of this engineering limitation, we tentatively conclude that we cannot permit licensees to switch their ATV and NTSC channels on an individual basis, unless their ATV-NTSC separation is comparable to or greater than their ATV-ATV spacing prior to the switch. We seek comment on this tentative conclusion and on the analysis leading to it. We also ask interested parties to comment on whether, at the time of conversion to ATV, we should nevertheless permit licensees to switch their ATV and NTSC frequenciesJwhere they would still meet appropriate spacing requirements.

43. Another approach would be to require all broadcasters to switch back to their former NTSC channels at some future date or, alternatively, to require some broadcasters to switch to new channels so that all ATV operations are reaccommodated in the most spectrally efficient manner. For example, this second alternative might establish a single contiguous band for all ATV operations. This approach might simplify ATV receiver design and make contiguous spectrum available for other uses.

44. We recognize, of course, that either of these alternatives would require sizeable re-investment by stations that would have to switch their ATV transmission facility to a new frequency. We request information on the scope of the investment necessary to make such a change in frequency. We also ask interested parties to comment on the costs and benefits of these alternatives. Comment is also solicited on whether, under either alternative, we should adopt a standard for waivers to allow a licensee to remain on its originally assigned ATV frequency provided that this would not interfere with existing ATV channels.

VI. SIMULCASTING

45. As we have stated previously, it is in the interest of both the public and the industry to ensure that the transition to ATV is made as smoothly as possible. In particular, we believe we should protect the existing investment in consumer equipment during this transition period and take steps to ensure that consumers are not forced to purchase new television receivers in order to enjoy top quality, over-the-air television service. One means of achieving this goal would be to require a broadcaster to simulcast programs on both its NTSC and ATV channels.[82] By requiring that at least a minimum amount or percentage of programming broadcast on the ATV channel is also broadcast on the NTSC channel, simulcasting would help ensure that consumers with conventional NTSC receivers are not relegated to receiving inferior programming during this transition period. This requirement could serve as, or be coupled with, a requirement that stations over time provide a progressively higher minimum amount of service on their ATV channel. At the same time, we also believe that any approach we adopt should give broadcasters the flexibility necessary to ensure that the new ATV technology succeeds in the marketplace. We thus seek comment on whether, in principle, a simulcasting requirement would be a desirable means of protecting existing consumer investment in television equipment, or whether there are any other equally desirable means of achieving this same goal. If we do adopt a simulcasting requirement, we seek comment on the amount or percentage of ATV programming to be required, whether this amount should be adjusted as the conversion period progresses, and, if less than full time, on whether we should require that simulcasting occur at particular times, *e.g.*, prime time or non-prime time.

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[79] For example, a station's service area on its ATV frequency may be smaller than its NTSC service area. If ATV receiver penetration becomes very high, the station may desire to use the NTSC channel to expand its ATV service area and sacrifice some NTSC coverage.

[80] Staff studies (1) assume existing NTSC-NTSC co-channel separations; (2) demonstrate that there is some flexibility to make ATV-ATV co-channel separation about 150 miles without significantly affecting the number of stations that can be accommodated; and (3) conclude that ATV-NTSC separation is the critical factor in providing additional spectrum for ATV, and that to accommodate a high percentage of stations, a minimum ATV-NTSC separation distance of 100 miles appears necessary. *See generally* 1989 OET Study, *supra*, at 8, 11-2 & Tables 4-H, 5-H; 47 C.F.R. § 73.610.

[81] Staff studies make certain assumptions about the technical capability of ATV signals with respect to co-channel NTSC signals. They assume that an ATV signal spaced at 100 miles from an NTSC co-channel can be designed to be relatively "benign" relative to an NTSC co-channel, *i.e.*, that NTSC viewers will be less affected by the presence of the ATV signal, than by another NTSC signal. The studies also assume that the ATV signal can be designed to be "robust" vis-a-vis an NTSC signal in that the ATV signal can exist with a 100 mile station separation distance from an NTSC co-channel without harmful interference from the NTSC signal. The studies do not focus on whether an ATV signal can be designed to be as "benign" and as "robust" with respect to cochannel effects from another ATV signal, however. Thus, if a station switches its ATV and NTSC frequencies with the result that its ATV frequency is now spaced less than the necessary distance from another ATV co-channel facility, the station's ATV facility might not be immune to unwanted interference effects from another ATV co-channel, as it would be for interference from an NTSC station. This increased interference potential would result in permanently smaller service areas for some ATV stations. On the other hand, if all stations converted to only their ATV-assigned frequencies, and NTSC operations ceased, any limitations placed on ATV coverage areas by the existence of the NTSC stations would be removed. Assuming no other uses for the NTSC spectrum, ATV coverage areas could increase.

[82] "Simulcast" is a contraction of "simultaneous broadcasting" and means the broadcast of one program over two channels to the same area at the same time. *First Order*, 5 FCC Rcd at 5629 n. 1.

VII. OTHER MATTERS

A. Patent Licensing

46. In light of the significance we ascribe to consumer acceptance of ATV technology,[83] we believe it appropriate at this juncture to address the issue of patent licensing, a question we believe is important to achieving high levels of receiver penetration. We expect that any proponent of an ATV transmission system selected as the nationwide standard will adopt a reasonable patent structure and royalty charging policy so that sufficient numbers of manufacturers will be able to produce ATV receivers and meet consumer demand.[84] In particular, we believe that any winning system, and its component parts as appropriate, may have to be licensed to other manufacturing companies in order to generate the supply volumes necessary for the service to develop. We seek comment on these patent licensing issues, and on the extent to which a proponent's patent licensing practices should be considered during the selection of an ATV transmission system.

B. Compatibility with Other Media

47. Until this point, we have considered implementation issues that bear on the use of ATV technology in the television transmission medium. However, this technology may have an impact on, or applications to, other media. ATV compatibility with other forms of transmission and applications would appear to be a desirable policy objective, provided that it does not unduly compromise other goals in this proceeding. To what extent can or should we encourage compatibility of a terrestrial broadcast ATV system with other media, including other video delivery media such as satellite transmission or video cassette recorders, and with computer applications and other forms of data transmission? The Committee for Open High Resolution Systems (COHRS), an informal ad-hoc group with members from the computer and telecommunications industries, government and academia, believes that an ATV standard should be interoperable,[85] extensible,[86] scalable,[87] and harmonious with standards for other applications.[88] We seek comment on the desirability of these qualities in an ATV system and on the importance of an ATV system's overall ability to interconnect with other applications and delivery systems.

VIII. PROCEDURAL MATTERS

A. Notice and Comment Provisions

48. Pursuant to applicable procedures set forth in Sections 1.415 and 1.419 of the Commission's Rules, 47 C.F.R. §§ 1.415 and 1.419, interested parties may file comments on or before December 20, 1991, and reply comments on or before January 20, 1992. To file formally in this proceeding, you must file an original plus five copies of all comments, reply comments, and supporting comments. If you want each Commissioner to receive a personal copy of your comments, you must file an original plus nine copies. You should send comments and reply comments to Office of the Secretary, Federal Communications Commission, Washington, D.C. 20554. Comments and reply comments will be available for public inspection during regular business hours in the Dockets Reference Room of the Federal Communications Commission, 1919 M Street, N.W., Washington, D.C. , 20554.

B. *Ex Parte*

49. This is a non-restricted notice and comment rulemaking proceeding. *Ex parte* presentations are permitted, except during the Sunshine Agenda period, provided they are disclosed as provided in the Commission rules. *See generally* 47 C.F.R. §§ 1.1202, 1.203, and 1.206(a).

C. Regulatory Flexibility Act Statement

50. As required by Section 603 of the Regulatory Flexibility Act, the Commission has prepared an Initial Regulatory Flexibility Analysis (IRFA) of the expected impact on small entities of the proposals suggested in this document. The IRFA is set forth in Appendix A. Written public comments are requested on the IRFA. These comments must be filed in accordance with the same filing deadlines as comments on the rest of the Notice, but they must have a separate and distinct heading designating them as responses to the Initial Regulatory Flexibility Analysis. The Secretary shall send a copy of this Notice of Proposed Rule Making, including the Initial Regulatory Flexibility Analysis, to the Chief Counsel for Advocacy of the Small Business Administration in accordance with paragraph 603(a) of the Regulatory Flexibility Act. Pub. L. No. 96-354, 94 Stat. 1164, 5 U.S.C. § 601 *et seq* (1981).

D. Other Matters

51. Accordingly, the Commission adopts this *Notice of Proposed Rule Making* pursuant to the authority contained in Section 4(i) and (j) and 303 of the Communications Act of 1934, as amended, 47 U.S.C. §§ 154 and 303.

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[83] *See supra* Section V.B.

[84] *Cf.* Public Notice, *Revised Patent Procedures of the Federal Communications Commission*, 3 FCC 2d 26 (1961).*See also Amendment of Part 3 of the Commission's Rules and Regulations to Permit FM Broadcast Stations to Transmit Stereophonic Programs on a Multiplex Basis*, 21 RR 1605, 1615 (1961); En Banc Letter from the FCC to Multiplex Development Corp., *reprinted* 21 RR 1616a (July 26, 1961). We also observe that the Advisory Committee ATV Test Procedures Test Management Plan, Section 2.1 addresses this matter and references the Patent Policy of the American National Standards Institute in connection therewith.

[85] Interoperability refers to ease of conversion between different media and between different applications. *Selected Issues: Interoperability, Extensibility, Scalability, and Harmonization of HDTV and Related Standards*, Comments to the FCC prepared by COHRS (May 7, 1991) (COHRS Letter).

[86] Extensibility refers to the ability to adapt to innovation and to uses requiring a higher quality signal and more information transmission. COHRS Letter, *supra*.

[87] Scalability refers to the creation of pictures by use of subsets of coded bits so that different quality pictures can be produced depending on the type of processors used. COHRS Letter, *supra*.

[88] Harmonization would permit receivers to be multistandard devices, capable of processing video formats from a variety of different sources. COHRS Letter, *supra*.

52. For further information regarding this proceeding, contact Gina Harrison, Legal Branch, Policy and Rules Division, Mass Media Bureau (202) 632-7792, Gordon Godfrey, Engineering Branch, Policy and Rules Division, Mass Media Bureau (202) 632-9660, or Alan Stillwell, Office of Engineering and Technology (202) 653-8162.

FEDERAL COMMUNICATIONS COMMISSION

Donna R. Searcy
Secretary

APPENDIX A

INITIAL REGULATORY FLEXIBILITY STATEMENT

I. Reason for the Action

1. This *Notice of Proposed Rule Making* suggests policies and rules for implementing Advanced Television (ATV) service in this country.

II. Objectives of the Action:

2. It is intended that the comments engendered through this action will resolve some of the issues surrounding the introduction of ATV service in the United States. The record established from comments filed in response to this *Notice of Proposed Rule Making*, as well as other Commission decisions, and the combined efforts of the Commission, the affected industries, the Advisory Committee on Advanced Television Service, and the ATV testing process, will lead to implementation of ATV in the most harmonious fashion and to selection of the most desirable ATV system.

III. Legal Basis:

3. Authority for this action may be found in 47 U.S.C. §§ 154 and 303.

IV. Reporting, recordkeeping and other compliance requirements:

4. Such requirements will vary according to the decisions that are ultimately made as to the application and allocation procedures.

V. Federal rules which overlap, duplicate or conflict with these rules:

5. There are no rules which would overlap, duplicate or conflict with these rules.

VI. Description, potential impact and number of small entities involved:

6. There are now 1465 UHF and VHF broadcast television licensees who would be eligible to apply for an ATV frequency if it is decided to limit initial applications to existing broadcasters. Eligibility would be extended to full-service television licensees, permittees and parties with applications pending as of the adoption of this *Notice*. These broadcasters would also be affected by any requirement to simulcast a minimum amount of programming on their NTSC and ATV channels. These same broadcasters could be affected by the type of ATV standard selected and by other aspects of ATV service which are still under consideration. For example, we propose that ultimately all existing broadcasters would be required to "convert" entirely to ATV, surrendering one 6 MHz simulcast frequency and broadcasting only in ATV. Additionally, other potential ATV applicants who are not existing broadcasters, as well as electronic appliance retailers, and broadcast equipment suppliers could be favorably affected by the decisions reached in this proceeding. The impact, if any, on noncommercial licensees or potential noncommercial licensees would be minimal, in light of our tentative conclusion that ATV channels may for the most part be allotted to the noncommercial reserve, and that the noncommercial reserve would in most cases not be used for ATV assignments. It is likely that a decision to use existing broadcast band spectrum for ATV service would displace to some degree low power television (LPTV) and translator stations operating in or near major markets. It is less clear that LPTV and translator stations operating in rural areas also might be displaced. Finally, the potential of ATV to affect small entities beyond the broadcast industry is as yet undetermined, but ATV equipment is already in use in such fields as medicine, teaching, and printing, and may spur new or expanded business in these and other areas.

VII. Any significant alternatives minimizing the impact on small entities consistent with stated objectives:

7. We propose to limit ATV applications to existing broadcasters only as an initial matter. Ultimately, eligibility for ATV frequencies would be unrestricted. In addition, we propose that any qualified applicant could apply for an ATV channel after it is determined that a given NTSC licensee has failed to construct an ATV facility within the proposed time limit of two years from date of issuance of the permit. Under our proposal, existing broadcasters also risk losing their priority for ATV frequencies if they have not filed an application for a construction permit for an ATV channel within three years from the time that ATV allotments are made. All of these proposals should soften the advantage that existing broadcasters may gain over other ATV applicants through the initial restriction.

8. We seek to minimize delay and needless expense (for both the Commission and prospective applicants) by proposing to allot ATV frequencies to each community of license currently listed in the Table of Allotments and to treat all applicants for ATV channels within a given community as mutually exclusive with all other applications for channels within that community. We propose several options for assigning particular channels where there is sufficient frequency for all eligible applicants. One approach is to formulate a Table of Allotments which not only allots channels to each community, but also randomly pairs particular ATV channels with existing NTSC channels listed on the table. A second option is to follow a two-step procedure of allotment to community followed by channel assignment to licensees. After allotment, we would permit existing NTSC licensees to apply for a construction permit on a first-come, first-served basis. If more than one broadcaster applied for the same channel, we would randomly rank applicants so that the highest ranked applicant would be granted its first choice, and so on. Another, supplemental approach would also permit

parties to negotiate channel changes among themselves after they had been awarded a channel, on condition that any profits derived therefrom be used for operation of an ATV facility. Finally, we might consider requiring broadcasters to demonstrate their financial qualifications to build and operate an ATV channel, as a deterrent to "warehousing" frequencies. In a rare case of insufficient ATV channels for all initially eligible applicants, we propose use of objective criteria or a lottery pursuant to 47 U.S.C. Section 309 (i). All of these proposals would speed the licensing process and involve less expense for existing licensees, than if, for example, a comparative hearing procedure were used.

9. Given the important role that noncommercial stations play in the broadcasting industry, we intend to maximize the opportunity noncommercial interests have to take part in ATV, and to ensure that any negative effects on them are minimized. Technical studies indicate that it is unlikely that vacant noncommercial allotments will be used for ATV service and it is likely that such vacant channels can be paired with an ATV channel in most cases. In no case would a VHF channel assignment reserved for noncommercial purposes be used for commercial ATV. Also, as indicated in the proposed implementation plan, new noncommercial applicants would be able to petition for a rulemaking for an additional allotment after the ATV allotment table is adopted and would be able to seek a channel assignment for such new allotment or apply for ATV assignment when an existing broadcaster fails to comply with the application and construction deadlines. We have further tried to limit the negative impact to displaced LPTV and translator stations by continuing to allow a displaced LPTV station to file a noncompetitive application for another channel in the community.

10. In proposing a three-year time limit for submitting an application and a two-year time period for actual construction, we intend to permit broadcasters ample time to adjust to the conversion to ATV.

11. Moreover, we are aware that conversion from NTSC to ATV will not happen overnight, and we are allowing for a transition period before the NTSC frequency must be surrendered. However, a definite point must be established for determining the most efficient use of the 6 MHz "simulcast" channel awarded to existing broadcasters in order to effectuate a transition to ATV. If ATV is successful at that point, NTSC broadcast would largely cease.

APPENDIX B

High Definition Television: Transition Scenario for TV Stations:

A CBS Work-in-Progress

(October 23, 1990 Preliminary Results)

OET Technical Memorandum, FCC/OET TM89-1

(December, 1989)

Interim Report: Estimate of Availability of Spectrum for Advanced Television

(ATV) in the Existing Terrestrial Broadcast Bands,

FCC/OET TM88-1

Preliminary Analysis of VHF and UHF Spectrum Scenarios --Part III, Advisory

Committee, Planning Subcommittee, Working Party 3, Doc. 0174

(June, 1991)

Advisory Committee Planning Subcommittee Fourth Interim Report

Fourth Interim Report of the Working Party 5 on Economic Factors and Market

Penetration of the Planning Subcommittee of the Advisory Committee on

Advanced Television Service

(March 4, 1991)

PBS Engineering: Preliminary HDTV Estimates

(October, 1990)

Selected Issues Interoperability, Extensibility, Scalability, and

Harmonization of HDTV and Related Standards, Comments to the FCC prepared by the Committee for Open High Resolution Systems (May 7, 1991)

Before the
Federal Communications Commission
Washington, D.C. 20554

STATEMENT OF CHAIRMAN ALFRED C. SIKES ON ADVANCED TELEVISION SYSTEMS (MM DOCKET NO. 87-268)

In an effort to lay the groundwork for advanced television in the United States, the FCC nineteen months ago endorsed a simulcast approach. This unprecedented move allowed leading companies worldwide to develop the most advanced system possible for the U.S. and held out the hope to the broadcast industry that it would be able to usher in a new generation of TV, not find itself in a technological junkyard.

All of us have been encouraged by the extraordinary developments of the last year and a half which seem to put the U.S. in the position of offering the world the first digital broadcast television system. However, recent statements concerning large screen NTSC as an alternative to HDTV have raised concerns that at least some in the broadcast industry regard the economics of HDTV as unattractive.

Questions affected by mass media economics and anticipated commercial developments are raised in this proceeding. And, while most broadcasters remain enthusiastic about advanced TV, I invite broadcasters to update the record on their interest in this technology.

The Commission has set aside spectrum for the purpose of making HDTV possible for broadcasters, not just the other video media. If the record indicates, however, that broadcasters, guided by their view of future economics, are losing interest in HDTV, then valuable UHF spectrum could be used for new land mobile services.

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

Rochester Telephone Corporation Tariff F.C.C. No. 1 — Transmittal Nos. 148 and 157

ORDER

Adopted: November 14, 1991; Released: November 15, 1991

By the Chief, Common Carrier Bureau:

1. On July 19, 1991, the New York State Legislature enacted legislation to increase the state Gross Income Tax (GIT) rate for utilities from 3 to 3.5 percent, retroactive to January 1991. Tr. 148 Description and Justification (D&J) at 1. By Transmittal No. 148, as amended by Transmittal No. 157, Rochester Telephone Corporation (Rochester) changes its End User and Common Line rates, its surcharge for the New York State gross receipts tax, and its price cap indices, actual price indices, and service band indices to reflect the changes in the New York State gross receipts tax. The total New York State tax liability to be recovered, including retroactive tax liabilities is $561,483. *Id.* at 3.

2. MCI filed a petition to reject, or alternatively, to suspend and investigate Transmittal 148 on August 7, 1991.[89] In that petition, MCI argued that Rochester failed to make any showing that an increase in its gross revenue surcharge is justified under the Commission's price cap rules. MCI Petition at 2. Specifically, MCI cited paragraph 165 of the *LEC Price Cap Order*,[90] which refers to a formula adjustment mark of 10.25 percent, and mentions that local exchange carriers (LECs) retain the opportunity to demonstrate that an adjustment in their allowed rate levels will be necessary to prevent a confiscatory outcome. MCI argued that Rochester had not attempted to show that its rate of return will drop below 10.25 percent for the current test period of July 1, 1991 through June 30, 1992. MCI thus concluded that Rochester had not demonstrated that an adjustment in its allowed rate levels would be necessary to prevent a confiscatory outcome. *Id.* at 23. Accordingly, MCI stated, Rochester had not shown that a "mid-test period" rate increase was necessary. *Id.* at 3.

3. Rochester replied that the formula adjustment provisions apply to LECs that earned below 10.25 percent in the previous year and allows such LECs to reset their Price Cap Indexes in their annual filings to earn a 10.25 percent return. By their very terms, Rochester argued, those provisions permit affected exchange carriers to adjust rates across all service categories once per year to avoid earning unreasonably low returns. Rochester Reply at 2. Rochester further noted that the formula adjustment provisions do not establish a test for evaluating changes to individual rate elements. *Id.* Rochester therefore concluded that the price cap rules do not preclude it from making the changes presented in Transmittal 148. *Id.* at 3.

4. The Common Carrier Bureau has reviewed the Rochester transmittals, MCI's petition, and Rochester's reply. We conclude that no compelling argument has been presented that the tariff is so patently unlawful as to warrant rejection, and that an investigation is not warranted at this time.

5. Accordingly, IT IS ORDERED that the petition to reject, or alternatively, suspend and investigate Rochester Telephone Corporation Tariff F.C.C. No. 1, Transmittal No. 148, filed by MCI Communications Corporation, IS DENIED.

FEDERAL COMMUNICATIONS COMMISSION

Richard M. Firestone
Chief, Common Carrier Bureau

[89] As originally filed, Rochester sought to increase its gross revenue surcharge 5.41 percent during the period between September 6, 1991 (the initially scheduled effective date of Transmittal 148) and December 31, 1991. Rochester's forecasted tax liabilities from that September effective date were $690,770, while its total New York State tax liability, including the retroactive portion, were estimated to be $891,929.

[90] Policy and Rules Concerning Rates for Dominant Carriers, CC Docket No. 87-313, Second Report and Order, 5 FCC Rcd 6786 (1990) (*LEC Price Cap Order*), *modified on recon.*, 6 FCC Rcd 2637 (1991), *appeal pending, D.C. PSC v. FCC*, No. 91-1279 (D.C.Cir. June 14, 1991).

Before the
Federal Communications Commission
Washington, D.C. 20554

PUBLIC NOTICE

Released: November 29, 1991

AMERICAN TELEPHONE AND TELEGRAPH COMPANY FILES PETITION FOR DECLARATORY RULING REGARDING OPERATOR-HANDLED "0+" INTERLATA TRAFFIC PRACTICE

Pleading Cycle Established

Comment Date: January 6, 1992
Reply Comment Date: January 21, 1992

On November 15, 1991, American Telephone and Telegraph Company (AT&T) filed a petition for a declaratory ruling that the refusal of Cascade Utilities, Inc., to permit AT&T to use its own facilities and personnel to provide operator services for AT&T's operator-handled "0+" interLATA traffic practices violates Sections 201(b) and 203 of the Communications Act.

AT&T states that the contractual arrangements that it had established with Cascade have been terminated, and that Cascade has refused AT&T's repeated requests that it transfer AT&T's 0+ interLATA traffic to AT&T's operator system. AT&T requests that the Commission issue a declaratory ruling that AT&T is entitled immediately to reclaim its traffic from Cascade's operator system, and that Cascade's actions to prevent or impair that process are unlawful.

Interested parties should file comments regarding the AT&T petition no later than **January 6, 1992.** Reply comments should be filed no later than **January 21, 1992.**

An original and four copies of all comments and replies must be filed with the Secretary of the Commission in accordance with Section 1.51(c) of the Commission's Rules. In addition, parties must also furnish one copy of their comments and replies to the Downtown Copy Center (DCC), the Commission's duplicating contractor, at its office in Room 246, 1919 M Street, N.W., Washington, D.C. 20554, and one copy to the Chief, Tariff Division, Room 518, 1919 M Street, N.W., Washington, D.C. 20554.

Copies of AT&T's petition may be obtained from DCC. The petition is also available for public inspection and copying in Room 518, 1919 M Street, N.W.

For further information, contact Terry S. Conway, Tariff Division, Common Carrier Bureau at (202) 632-6917.

FEDERAL COMMUNICATIONS COMMISSION

Before the
Federal Communications Commission
Washington, D.C. 20554

CC Docket No. 87-568

In the Matter of

AT&T COMMUNICATIONS
Revisions to Tariff F.C.C. No. 12

MEMORANDUM OPINION AND ORDER ON REMAND

Adopted: October 24, 1991; Released: November 22, 1991

By the Commission:

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I. INTRODUCTION

1. This Order resolves the issues remanded to the Commission by the U.S. Court of Appeals [1] upon the Court's review of the Commission's *Tariff 12 Order*. [2] In the *Tariff 12 Order*, the Commission determined that American Telephone and Telegraph's (AT&T) Tariff F.C.C. No. 12 Options 1-4 do not violate the prohibition of unreasonable discrimination in the provision of "like" services in Section 202(a) of the Communications Act, 47 U.S.C. § 202(a).[3] However, the Court of Appeals found that the Commission's analysis was flawed and remanded the *Tariff 12 Order* for further proceedings.

2. For the reasons discussed below, we affirm the Commission's conclusion in the *Tariff 12 Order* that Tariff 12 is not "like" the individually tariffed services provided by AT&T on a disaggregated basis. In addition, we find that, on further analysis, and contrary to our prior decision, Tariff 12 integrated service packages need not be "like" each other for purposes of Section 202(a) of the Communications Act. We further conclude that Tariff 12 Options 1-4, in fact, are not "like" each other. Additionally, we discuss the other issues designated for investigation in this docket. We conclude that Tariff 12 Options 1-4 satisfy the general availability requirement and comply with the

[1] *See MCI Telecommunications Corp. v. FCC*, 917 F.2d 30 (D.C. Cir. 1990) (*Tariff 12 Decision*).

[2] AT&T Communications, Revisions to Tariff F.C.C. No. 12, Memorandum Opinion and Order, 4 FCC Rcd 4932 (*Tariff 12 Order*), *recon. denied*, 4 FCC Rcd 7928 (1989).

[3] The instant docket was initiated as an investigation under Section 204(a) of the Communications Act, 47 U.S.C. § 204(a), of AT&T Transmittal Nos. 1018, 1102, 1145, 1336, 1349, and 1409, which describe Virtual Telecommunications Network Service (VTNS) Options 1, 2, 3, and 4. These transmittals were found unlawful by the Commission in the *Tariff 12 Order*. AT&T deleted the unlawful provisions and refiled the options under Transmittal No. 1592, which became effective without suspension or investigation. *See* AT&T Communications, Revisions to Tariff F.C.C. No. 12, Transmittal No. 1592, Memorandum Opinion and Order, 4 FCC Rcd 5430 (Com. Car. Bur. 1989) (*Transmittal 1592 Order*). The instant Order examines Tariff 12 Options 1-4 as modified by Transmittal 1592. At the outset, this docket also included a service called Digital Tandem Switched Network Services (DTSN) (Transmittal Nos. 895 and 961). DTSN presently has no customers, has not had a customer for almost two years, and was not included in the remand by the Court of Appeals. Further, AT&T has informed the Commission that it wishes to withdraw this service from Tariff 12. Accordingly, DTSN is not addressed in this Order.

Commission's policy prohibiting restrictions on resale and shared use. We also explain our reasons for concluding that questions relating to, compliance with the private line guidelines were improvidently designated and need not be reached.[4]

II. BACKGROUND

3. AT&T's Tariff 12 consists of a series of options, each constituting a customized package of telecommunications services. In the *Tariff 12 Order,* the Commission considered whether Tariff 12 Options 1-4 violated the prohibition of unreasonable discrimination in the provision of "like" services in Section 202(a) of the Communications Act. The Commission concluded that Tariff 12 services do not violate that prohibition because that provision prohibits unreasonable discrimination between "like" communications services and the service packages in Tariff 12 are not "like" the individual services available on a disaggregated basis under other AT&T tariffs.[5] The Commission also found that Tariff 12 options are "like" each other and must be made generally available to similarly situated customers to avoid discriminating unreasonably among Tariff 12 customers.[6] In addition, the Commission found that, because certain restrictions in AT&T's Tariff 12 offerings unreasonably limited the availability of the service packages, the offerings were unlawful. The Commission directed AT&T to file revisions to Tariff 12 to eliminate the restrictions or to withdraw the tariff.[7]

4. In response to the *Tariff 12 Order,* AT&T filed Transmittal No. 1592. On June 30, 1989, the Common Carrier Bureau (Bureau) released a Memorandum Opinion and Order[8] permitting the refiled options to become effective without suspension or investigation subject to the outcome of the Commission's consideration of the then-pending petitions for reconsideration of the *Tariff 12 Order.* The Commission denied the petitions for reconsideration of the *Tariff 12 Order* in a Memorandum Opinion and Order released November 8, 1989.[9] The decision was appealed to the United States Court of Appeals for the District of Columbia Circuit.

5. On October 23, 1990, the D.C. Circuit remanded this proceeding to the Commission. In the *Tariff 12 Decision,* the Court said that the Commission's likeness analysis appeared to have impermissibly relied in part on cost and "price considerations and ordered the Commission to determine anew, without regard to such factors, whether the Tariff 12 options under investigation are "like" services available under AT&T's generic tariffs. The Court also ordered the Commission to complete its Section 202(a) analysis of Options 1-4 vis-a-vis each other by ascertaining whether any price differences among those options are unreasonably discriminatory. Finally, the Court ordered the Commission either to resolve the remaining designation issues (*i.e.,* whether Options 1-4 violate a carrier's duty to make services generally available, comply with the Commission's resale and shared use policies, and comply with the private line guidelines) or to provide an adequate explanation for not doing so.

6. In response, on February 1, 1991, the Commission released an Order inviting further comment on the remand issues.[10] Thirty-eight parties (several representing multiple organizations) filed comments and twenty-three parties filed reply comments. A number of parties filed informal submissions and other *ex parte* presentations.[11]

III. DISCUSSION

A. Discrimination Analysis

1. Legal Standard for Evaluating Discrimination

7. Tariff 12 is the vehicle through which AT&T provides customized integrated service packages to large business users. AT&T (or any other common carrier subject to the Act) is free to provide all of the services and facilities included in these packages, and in general to provide the services best adapted to customers' needs, provided that such packages comply with Section 202(a) (and other provisions) of the Act. Section 202(a) prohibits unjust or unreasonable discrimination in the provision of "like" services. Specifically, Section 202(a) provides that:

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[4] The parties raise a number of issues which were not designated for investigation and are therefore outside the scope of this Section 204 proceeding. Although we therefore do not address those issues here, parties remain free to raise such issues in other, more appropriate proceedings.

[5] *Tariff 12 Order,* 4 FCC Rcd at 4935-37.

[6] *Id.* at 4937-38.

[7] *Id.* at 4938.

[8] *Transmittal 1592 Order, supra* note 3.

[9] AT&T Communications, Petitions for Reconsideration, Memorandum Opinion and Order on Reconsideration, 4 FCC Rcd 7928 (1989) (*Reconsideration Order*).

[10] AT&T Communications, Revisions to Tariff F.C.C. No. 12, Order, 6 FCC Rcd 740 (1991) (*Remand Designation Order*).

[11] A listing of the commenting parties is attached to this Order as Appendix A. The abbreviations for the parties as indicated in the Appendix are used throughout this Order.

NCR Corporation filed comments on July 22, 1991, accompanied by a letter requesting that its late-filed comments be included in the record. Since NCR has not shown good cause for late filing, we will not formally consider its comments herein. A number of parties filed informal submissions after the reply comment deadline. None of these submissions were accompanied by a request for late acceptance. Thus, we will not formally consider these comments herein. All of these filings have been considered informally as permissible *ex parte* presentations. *See* 47 C.F.R. § 1.1206.

On April 17, 1991, Williams filed Supplemental Comments accompanied by a Motion to Accept Supplemental Comments. AT&T filed an opposition to William's motion on May 1, 1991. Williams' motion concerns antitrust matters, which are outside the scope of this investigation. Accordingly, we will deny Williams' Motion to Accept Supplemental Comments herein. On September 30, 1991, MCI filed a Motion to Supplement Record. AT&T and Ad Hoc filed oppositions to MCI's motion on October 10, 1991. MCI filed a reply to the oppositions on October 23, 1991. MCI's motion concerns Option 23, which is outside the scope of this investigation. *See* note 3, *supra.* Accordingly, we will deny MCI's Motion to Supplement Record herein. The proper forum for allegations involving options outside the scope of this proceeding is the complaint process.

> It shall be unlawful for any common carrier to make any unjust or unreasonable discrimination in charges, practices, classifications, regulations, facilities, or services for or in connection with like communication service, directly or indirectly, by any means or device, or to make or give any undue or unreasonable preference or advantage to any particular person, class of persons, or locality, or to subject any particular person, class of persons, or locality to any undue or unreasonable prejudice or disadvantage.

8. To determine whether an offering complies with the carrier's duty to refrain from unreasonable discrimination in the provision of "like" services, the Commission engages in a three-step inquiry. Specifically, the Commission must determine: (1) whether the services are "like"; (2) if so, whether there is a price difference; and (3) if so, whether the price difference is reasonable.[12] If two services are "like," the burden rests with the carrier to show that any discrimination in the pricing of the two services is reasonable.[13]

9. The generally accepted standard for determining likeness under Section 202(a) is the "functional equivalency" test.[14] The focus of the functional equivalency test is whether the services are "'different in any material functional respect.[15] The test requires the Commission to examine both the nature of the services and customer perception of the functional equivalency of those services.[16] In fact," customer perception [of functional equivalency is the] linchpin" of the functional equivalency test.[17]

10. It is the Commission's responsibility to apply the functional equivalency test.[18] However, the *Ad Hoc* court provided some guidance to aid the Commission in performing a likeness analysis. The *Ad Hoc* majority stated that the Commission: (1) should not blend discrete services when applying the test, (2) should evaluate the perceptions of users of each service under examination, and (3) should consider the alleged differences in the services and state its reasoning should it determine that an alleged difference is not relevant to the determination of functional equivalency.[19]

2. Application of the Functional Equivalency Test in the *Tariff 12 Order*

11. The commenters disagree as to whether the Commission erred in applying the functional equivalency test in the *Tariff 12 Order*. AT&T contends that the first guideline proffered by the *Ad Hoc* court, which prohibits the Commission from blending discrete services when applying the functional equivalency test,[20] prevents the Commission from concluding that the "single integrated service" available in VTNS is "like" any combination of capabilities available in tariffs for discrete services.[21]

12. A number of commenters argue that this guideline does not necessitate the result propounded by AT&T. Sprint and others claim that this guideline was established because the *Ad Hoc* court concluded that the Commission had erred by equating MTS to a combination of Inward and Outward WATS in order to find WATS and MTS "like." These commenters argue that the *Ad Hoc* court rejected this comparison because that Commission conclusion could not be reconciled with a prior Commission holding that Inward WATS and Outward WATS were functionally different and because customer perception did not support this blending.[22] The commenters contend that these considerations do not apply in the instant case because Tariff 12 is not one discrete service that can be compared to two other discrete services, but rather is a package of services that must be compared to discrete services.[23] Sprint declares that any other interpretation would read the "like" services test out of existence because if bundled offerings could not be compared with their constituent parts, all AT&T would have to do to avoid any comparisons is to provide an array of bundled offerings.[24]

13. We find that the Commission did not err in its application of the functional equivalency test in the *Tariff 12 Order*. Both AT&T and Sprint's arguments beg the question at issue. The likeness issue raised by Tariff 12 is whether an integrated service package is a single service, unlike the discrete services that appear in AT&T's individual tariffs, or a mere combination of those individually tariffed discrete services, with no additional or distinguishing functionalities. AT&T argues that this Commission would violate the *Ad Hoc* court's prohibition against combining "unlike" services for purposes of comparison with the service at issue if this Commission compares the "single" service in Tariff 12 options to AT&T's individually tariffed services. Similarly, Tariff 12 opponents argue that the *Ad Hoc* court's prohibition is irrele-

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[12] *Tariff 12 Decision*, 917 F.2d at 39 (*citing MCI Telecommunications Corp. v. FCC*, 842 F.2d 1296, 1303 (D.C. Cir. 1988)).

[13] *See, e.g., Tariff 12 Order*, 4 FCC Rcd at 4935.

[14] *Tariff 12 Decision*, 917 F.2d at 39 (*citing Ad Hoc Telecommunications Users Comm. v. FCC*, 680 F.2d 790, 795 (D.C. Cir. 1982); *Ad Hoc*, 680 F.2d at 795 (*citing American Broadcasting Cos. v. FCC*, 663 F.2d 133, 138 (D.C. Cir. 1980); *Western Union International, Inc. v. FCC*, 568 F.2d 1012, 1018 & n. 11 (2d Cir. 1977), *cert. denied*, 436 U.S. 944, 98 S. Ct. 2845, 56 L. Ed. 2d 785 (1978); *American Trucking Associations v. FCC*, 377 F.2d 121, 127, 129 (D.C. Cir. 1966), *cert. denied*, 386 U.S. 943, 87 S. Ct. 973, 17 L. Ed. 2d 874 (1967)).

[15] *Tariff 12 Decision*, 917 F.2d at 39 (*quoting Ad Hoc*, 680 F.2d at 795); *Ad Hoc*, 680 F.2d at 795 (*quoting American Broadcasting Cos.*, 663 F.2d at 138; *American Trucking*, 377 F.2d at 127).

[16] *Ad Hoc*, 680 F.2d at 795 (*citing American Broadcasting Cos.*, 663 F.2d at 139).

[17] *Id.* at 796.

[18] *Tariff 12 Order*, 4 FCC Rcd at 4935. *See also Ad Hoc*, 680 F.2d at 796.

[19] *Ad Hoc*, 680 F.2d at 796.

[20] *See* 10, *supra*.

[21] AT&T Comments at 11 & Reply Comments at 11.

[22] *E.g.*, Sprint Reply Comments at 9 n. 2; Williams Reply Comments at 5; CompTel Reply Comments at 14 n. 12; MCI Reply Comments at 13-14.

[23] *E.g.*, Sprint Reply Comments at 9 n. 2; Williams Reply Comments at 5; CompTel Reply Comments at 14 n. 12.

[24] Sprint Reply Comments at 9 n. 2. *See also* Williams Reply Comments at 4.

vant because Tariff 12 is *not* a single discrete service that the Commission is comparing to a blend of other discrete services. Both of these arguments assume away the very issue we must decide, namely, whether a Tariff 12 option is indeed a "single" service that is unlike a simple collection of discrete services. Accordingly, we will follow the same procedure herein.

B. Analysis of Tariff 12 Integrated Service Packages and AT&T's Individually Tariffed Services

14. We now consider whether integrated service packages in general, and Tariff 12 Options 1-4 in particular, are "like" AT&T's individually tariffed services. For the reasons discussed below, we conclude they are not.

1. Functional Differences Between Tariff 12 Options and Individually Tariffed Services

15. As noted in Section III. A. 1., *supra*, the first step of our analysis is to determine whether the services in question are "like" using the functional equivalency test. In the *Tariff 12 Order*, the Commission found that Tariff 12 integrated service packages are not "like" the individually tariffed services available from AT&T because "[i]ntegrated service packages provide a number of functionalities unavailable if the package is disaggregated and its components provided under separate tariffs"[25] from the perspectives of both the nature of the services involved and customer perception of the services.[26] The Commission found these functionalities include, *inter alia*, (1) flexible provisioning of the customer's network, (2) network demand and traffic monitoring and responsive service mix adjustments by the carrier, and (3) provision of a "turnkey" response to customers' telecommunications needs whereby the carrier unifies all relevant technology requirements and terms and conditions in a single tariff.[27]

16. In addition, the Commission discussed modern economic theory in relation to Tariff 12 in terms of production cost and price stability. Specifically, the Commission explained that integrated service packages, "by combining a mutual commitment to a specified volume and level of service, offer both the possibility of cost reductions from providing [a] more stable set of outputs, as well as the additional value which the package offering may provide the customer."[28]

17. On appeal, the Court held that the Commission appeared to have impermissibly relied in part on cost and price considerations in making the likeness determination. The Court stated that factors such as cost and price differentials must not be examined when applying the functional equivalency test and can only be introduced once likeness has been ascertained in order to determine whether any discrimination that may exist is unreasonable or unjust.[29] The Court stated further that it could not determine "whether [the Commission] considered that portion of its explanation which is arguably not cost- or price-based to be independent of the impermissible factors and a sufficient basis for its conclusion in their absence,"[30] and thus could not "affirm the FCC's likeness determination, because an agency order is 'arbitrary and capricious if the agency has relied on factors which Congress has not intended it to consider.'"[31] The Court thus remanded the likeness issue, directing that it be resolved "without regard for differentials in cost to the carrier and price to the customer," and stating that it "express[ed] no opinion as to the permissibility or validity of the other justifications given by the "FCC or whether they, standing alone, would be sufficient to support a determination that the services are not like." [32]

18. In responding to the Court's mandate, we first wish to clarify that the Commission's finding in the *Tariff 12 Order* that Tariff 12 is not "like" AT&T's individual service tariffs did not rely, in whole or in part, on the discussion of the economic considerations that the Court of Appeals found impermissible. That discussion was included solely in anticipation of challenges to AT&T's pricing of Tariff 12. The discussion anticipated the argument that Tariff 12 customers are getting "more for less" because integrated packages provide customers with additional functionalities that the customer might otherwise perform if it assembled a group of services from individual generic tariffs, which arguably could increase the cost and value of a package. The Commission intended only to clarify that Tariff 12 customers are not getting "more for less" because the Tariff 12 package can nevertheless produce efficiencies for AT&T which enable it to price the package at a rate lower than that for a similar network comprised of individually tariffed services. We emphasize that these types of economic considerations play no role in our conclusion in this Order that Tariff 12 is not "like" individually tariffed services.

19. In the *Tariff 12 Order*, the Commission examined the functional differences between Tariff 12 integrated service packages and individually tariffed services from the perspectives of both the nature of the services involved and customer perception of the services. The Commission listed several functionalities, the most important of which are flexible provisioning, network monitoring, and the "turnkey" nature of Tariff 12 service.[33]

20. In response to the *Tariff 12 Decision*, we requested further comment on the issue of whether Tariff 12 integrated service packages are "like" AT&T's individually tariffed services.[34] Tariff 12 proponents were virtually unanimous in their assertions that Tariff 12 is not "like" AT&T's individually tariffed services. In support, they identified a number of alleged functional differences between Tariff 12 options and individual service tariffs. Tariff 12 opponents argue that Tariff 12 is "like" AT&T's individually tariffed services. They dispute the validity of the functionalities alleged by Tariff 12 supporters on the grounds that they are not material, are not unique to

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[25] *Tariff 12 Order*, 4 FCC Rcd at 4936.
[26] *Id.* at 4937.
[27] *Id.* at 4936-37.
[28] *Id.* at 4937.
[29] *Tariff 12 Decision*, 917 F.2d at 39 (*citing American Broadcasting Cos.*, 663 F.2d at 139; *Western Union*, 568 F.2d at 1019 n. 15).
[30] *Id.*
[31] *Id.* at 39-40 (*quoting Motor Vehicles Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983)).
[32] *Id.* at 40.
[33] *See Tariff 12 Order*, 4 FCC Rcd at 4936-37.
[34] *See Remand Designation Order*, 6 FCC Rcd at 740.

Tariff 12, or involve non-tariffed components that cannot be included in a likeness analysis. We discuss these functionalities in more detail below and find that Tariff 12 is not "like" AT&T's individual service tariffs.

a. Customer Perception

21. As a threshold issue, there is some dispute among the parties as to whether the record is complete with respect to customer perception. Some commenters allege that the record is materially incomplete. These parties contend that the *Ad Hoc* requirement that the perceptions of users of each service be considered has not been met because the record does not contain evidence of the perceptions of non-Tariff 12 customers.[35] CompTel argues that the absence of such evidence is a legal preclusion to any finding that the customer perception element of the functional equivalency test supports the conclusion that Tariff 12 options are not "like" individually tariffed services.[36]

22. In response, Tariff 12 proponents assert that the *Ad Hoc* standard is satisfied. AT&T asserts that the record contains comments from customers who satisfy all their needs from Tariff 12 (or the competing offerings of AT&T's competitors), customers who use integrated service packages for some needs but use combinations of individual service tariffs to meet other needs, and customers who could use integrated service packages but have elected to continue satisfying their needs entirely from individual service tariffs.[37] CNSUG claims that large users who have commented in this proceeding were until recently, without exception, users of individually tariffed services, and that many continue to use such services to meet a part of their needs.[38] Ad Hoc maintains that the assertion that the record is devoid of the perceptions of non-Tariff 12 customers was never true prior to the remand and is even less true now.[39] Ad Hoc claims that some of the users represented in its filing have purchased custom service agreements from AT&T and its competitors, others continue to purchase individually tariffed services from AT&T and its competitors, and many purchase service under both types of arrangements.[40]

23. After review of the record, we find that the record of customer perception is complete. Our review indicates that the record contains comments by: (1) customers who take service under Tariff 12 or other custom service agreements, individual service tariffs, or both and (2) the representatives of such customers.[41] Thus, we find the contention that we are legally precluded from making any determinations on the basis of customer perception to be without merit.

b. Service Functionalities

(1) Provisioning Flexibility

24. In the *Tariff 12 Order*, the Commission found that integrated service packages do not "require the carrier to provide service over dedicated facilities or particular facility types" and that "the carrier can change the facility and service mix used to deliver an integrated package service completely unbeknownst to the customer."[42] We further found that this "increased flexibility in the provisioning of the integrated package service is not available if the customer orders a variety of services individually from the carrier's disaggregated tariffs."[43] In addition, we found that this provisioning flexibility "allows the carrier to eliminate otherwise duplicative functions, and to more efficiently guarantee service quality through alternate routing."[44]

25. In response to the *Remand Designation Order*, AT&T avers that Tariff 12 gives AT&T provisioning flexibility it would not have if similar transmission capabilities were ordered under a combination of individual tariffs. AT&T states that it may provide the tariffed service through any combination of facility types it chooses (and re-configure facilities during the service term) subject only to provisions in some options giving customers limited specific rights (*e.g.*, to prevent use of satellite facilities). AT&T notes that this increased provisioning flexibility means that Tariff 12 customers relinquish virtually all control over the routing or the facilities to be used to provide their service.[45] AT&T disputes the contention that these differences in customer control are not material because the provisioning changes occur unbeknownst to the customer. AT&T argues that customers are aware of this provisioning difference before they subscribe to Tariff 12 and that this is highly material to their procurement decisions. [46] Ad Hoc and CNSUG, commenters representing a significant number of Tariff 12 customers, also cite reduced customer control over service provisioning as a functional difference of Tariff 12 service.[47] Ad Hoc and CNSUG both state that, with few exceptions, the Tariff 12 customer has no ability to dictate to AT&T the routing or the type of facilities to be used to provision the option.[48]

26. Several commenters assert in opposition that AT&T's ability to provision flexibly is not unique to Tariff 12. Sprint claims that other AT&T customers also do not have the ability to control selection of particular technologies or transmission facilities or the reprovisioning of these facilities during the service term.[49] Williams and MCI allege that AT&T's customers for any non-private line service have no more control over the physical routing of a call than does a customer purchasing the

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[35] *E.g.*, CompTel Comments at 13-14 & Reply Comments at 17-18; Sprint Reply Comments at 9; MCI Comments at 18-19 & Reply Comments at 14-15.
[36] CompTel Comments at 14.
[37] AT&T Reply Comments at 46.
[38] CNSUG Reply Comments at 13 n. 20.
[39] Ad Hoc Reply Comments at 6 n. 5.
[40] Ad Hoc Comments at 5. *See also* API Comments at 2.
[41] *See* 22, *supra*.
[42] *Tariff 12 Order*, 4 FCC Rcd at 4936.
[43] *Id.*
[44] *Id.* at 4937.
[45] AT&T Comments at 18-19 & Reply Comments at 18-19.
[46] AT&T Reply Comments at 19-21. *See also* US West Comments at 8 n. 15.
[47] Ad Hoc Comments at 8-10; CNSUG Comments at 23.
[48] Ad Hoc Comments at 14; CNSUG Comments at 23-24. *See also, e.g.*, US West Comments at 5-8. These exceptions are limited in scope. *See* Ad Hoc Comments at 14 n. 12; CNSUG Comments at 24 n. 55.
[49] Sprint Reply Comments at 11-13.

same function under Tariff 12.[50] MCI and MCC also argue that because the provisioning changes are unbeknownst to the customer, the changes do not change the functional characteristics of the service from the customer's perspective, and that this factor is relevant only to the question of whether the discrimination is reasonable.[51]

27. After review of the record, we affirm our finding in the *Tariff 12 Order* that Tariff 12 provides AT&T with a level of provisioning flexibility that is not available if the customer orders specific services individually from AT&T's disaggregated tariffs. Under Tariff 12, AT&T selects and arranges for the network components used to provide service, may use any suitable technology or combination of technologies to do so, may change the network components used to furnish service at any time (except where particular options limit this right in specified circumstances), and retains the right to use either shared or dedicated facilities to provide service.[52] While it is true that some other AT&T tariffs permit AT&T some flexibility in the provision of service, none contain as extensive a delegation of control to AT&T with respect to service and facility provisioning. AT&T performs such extensive service and facility provisioning only for Tariff 12 customers. This feature is not available to customers ordering a specific combination and quantity of services from AT&T's generic service tariffs. Thus, we find that the flexible provisioning functionality makes integrated service packages in general, and Tariff 12 Options 1-4 in particular, functionally different from networks composed of individually tariffed services.[53]

28. In addition, customers perceive provisioning flexibility to be a functionality distinguishing Tariff 12 from AT&T's generic services.[54] Thus, the fact that the provisioning changes take place unbeknownst to the customer does not in any way reduce or negate the materiality of this factor. Customers are aware of the provisioning difference before they select Tariff 12, realize that they are giving up the right to have the service provided in a particular way, and consider this factor material to their procurement decisions.

(2) Network Monitoring

29. In the *Tariff 12 Order*, the Commission found that AT&T's performance of provisioning functions and the concomitant relinquishment of customer control resulted in greater network monitoring responsibilities for AT&T for its Tariff 12 customers than for customers whose networks are composed of individually tariffed services.[55] The Commission noted that AT&T's disaggregated tariffs "typically specify facility types and the customer must specify quantities for each service, re-ordering when it wishes to change the relative quantities needed." [56] In contrast, the Commission found that "integrated service packages include as service functionalities much of the periodic monitoring of demand and tracking of network traffic load, as well as the adjustment of service mix in response to changes in traffic patterns, which the customer would otherwise perform." [57]

30. In response to the *Remand Designation Order*, AT&T asserts that the tariffed service under VTNS is the customer's entire network and thus AT&T monitors the customer's entire network. AT&T states that, in contrast, customers who create networks by ordering services under assemblages of individual tariffs must themselves monitor the network piece-parts on an individual basis.[58] Other commenters also maintain that AT&T's end-to-end service monitoring is a functional difference which eliminates a customer's need to manage its network as is necessary when taking service under AT&T's individual service tariffs. For example, US West asserts that, with Tariff 12 packages, it is AT&T's responsibility, not the customer's, to monitor and constantly "tweak" the mix of facilities to account for variations in traffic and service requirements on each customer's network.[59] US West further contends that this is an important functional difference to customers.[60] SWB states that Tariff 12 packages provide additional features and functionalities such as end to end service monitoring that cause customers to perceive Tariff 12 packages as different from their tariffed components.[61]

31. In opposition, Sprint and Williams charge that network monitoring activities such as traffic studies and centralized monitoring are not functionalities unique to Tariff 12 because AT&T also performs them for its major accounts outside Tariff 12.[62] Williams further contends that the fact that AT&T monitors a Tariff 12 customer's network individually from its general network monitoring facilities does not mean Tariff 12 is functionally different from a network consisting of individually tariffed services.[63] In addition, Sprint contends that the tariffed versions of VTNS options do not include any rates, terms, or conditions concerning the monitoring of demand and the tracking of network traffic load and thus the Commission may not consider such functionalities in making a likeness determination. [64]

32. After review of the record, we affirm our finding in the *Tariff 12 Order* that AT&T provides network monitoring functions for Tariff 12 customers that AT&T does not provide to customers whose networks are composed of individually tariffed services. AT&T monitors all of the network's capabilities and, in response to changes in demand and network traffic patterns, AT&T adjusts the service mix. We also find that the network monitoring functionality is inherent in the provision of Tariff 12 service because it is a prerequisite for the flexible provi-

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[50] Williams Reply Comments at 7-8; MCI Comments at 10.

[51] MCI Comments at 9-10; MCC Comments at 14.

[52] AT&T Tariff F.C.C. No. 12, §§ 7.1 General, 7.2.1 Transmission Medium, 7.2.19. B.2 Changes in Components, Operations, or Procedures.

[53] Throughout this Order we make findings concerning integrated service packages generally and those specific Tariff 12 options before us. We do not mean to suggest, however, that other Tariff 12 options are necessarily integrated service packages or that they necessarily are lawful under Section 202(a).

[54] *See, e.g.*, text accompanying notes 47-48, *supra*. *See also* Ad Hoc Comments at 8-10; API Reply Comments at 6-7.

[55] *Se e Tariff 12 Order*, 4 FCC Rcd at 4936.

[56] *Id.*

[57] *Id.*

[58] AT&T Comments at 23 & Reply Comments at 28-29.

[59] US West Comments at 8 n. 15. *See also id.* at 6.

[60] US West Comments at 8 n. 15.

[61] SWB Comments at 4.

[62] Sprint Comments at 12-13; Williams Comments at 12-14.

[63] Williams Reply Comments at 14-15.

[64] Sprint Comments at 12-13.

sioning AT&T performs and thus is part of the tariffed service provided by AT&T. Thus, we find that the network monitoring functionality makes integrated service packages in general, and Tariff 12 Options 1-4 in particular, functionally different from networks composed of individually tariffed services.

(3) "Turnkey" Nature of Package

33. In the *Tariff 12 Order*, the Commission noted that the "turnkey" functionality of Tariff 12 integrated service packages "permit[s] customers to identify their total service requirements to which the carrier responds with a single tariff which unifies all relevant technology requirements and applicable terms and conditions."[65] The Commission found that the "turnkey" functionality was of great importance to customers because it enabled them to "eliminate significant management and support costs associated with overseeing the coordination of services obtained from [various individual] tariffs" and to "better evaluate service alternatives from competing providers." [66]

34. In response to the *Remand Designation Order*, AT&T asserts that Tariff 12 allows the creation of customized networks that contain integrated terms and conditions. AT&T states that a customer devising its network from multiple tariffs faces differing and sometimes inconsistent terms and conditions from service to service because individual service tariffs are not designed to interrelate with one another or to allow the customization that many large sophisticated customers desire.[67] For example, AT&T notes that, *inter alia*, minimum commitments, time commitments, termination rights, outage allowances, and testing requirements all vary from tariff to tariff.[68] AT&T further asserts that Tariff 12 networks are more closely tailored to customers' specific needs than a network comprised of individually tariffed components could possibly be. For example, AT&T contends that customers can negotiate for, *inter alia*, performance objectives and term lengths. [69]

35. A number of commenters echo the views expressed by AT&T. SWB states that integrated service packages unify all relevant technology, terms, and conditions needed to satisfy a customer's total service requirements in a single tariff, and that customers can design their own service offerings specifically and flexibly tailored to meet their needs.[70] CNSUG claims that Tariff 12 permits customers to aggregate telecommunications services under a single set of terms and conditions.[71] Du Pont avers that with single service tariffs, the customer is responsible for monitoring compliance with often incompatible terms and conditions.[72] Ad Hoc claims that Tariff 12 permits customers to coordinate the procurement and installation of a number of functionalities within a single time-frame rather than manage a number of individual procedures and time-frames as required when using individual tariffs.[73]

36. Some commenters dispute the Commission's finding that the "turnkey" nature of Tariff 12 packages constitutes a legitimate functionality. Sprint and Williams allege that this is nothing more than the bundling of rates, terms, and conditions of generally available services into a single offering.[74] These parties also allege that this functionality is not unique to Tariff 12 because AT&T's Software Defined Network (SDN) service also permits customers to obtain a packaged network in lieu of piecing together a number of individually tariffed service offerings.[75] Sprint and MCI dispute the Commission's findings in the *Tariff 12 Order* that the "turnkey" functionality eliminates the support costs associated with overseeing the coordination of services obtained from individual tariffs.[76] These two commenters also claim that there is no evidence that an integrated service package enables customers to better evaluate service alternatives from competing providers.[77]

37. After review of the record, we affirm our finding in the *Tariff 12 Order* that the "turnkey" functionality of Tariff 12 integrated service packages permits AT&T to provide a single tariff which unifies all relevant technology requirements and applicable terms and conditions for the total service requirements identified by the customer. AT&T provides this unified, customized, coordinated response to a customer's total telecommunications needs under no other tariff, including SDN, because no other tariff provides the full range of features and functionalities available under Tariff 12. The "turnkey" functionality eliminates the customer's need when designing its network to coordinate the various services it requires, and places that responsibility on AT&T. This, in turn, reduces the amount of customer resources necessary to oversee this task. We also affirm that customers perceive the "turnkey" nature of Tariff 12 service as a functionality that distinguishes Tariff 12 from AT&T's generic services.[78] We therefore conclude that the "turnkey" functionality inherent in Tariff 12 makes integrated service packages in general, and Options 1-4 in particular, functionally different from networks comprised of individually tariffed services. Given this finding, we need not respond to Sprint's and MCI's claims regarding our prior conclusion that the "turnkey" functionality also enables customers to better evaluate service alternatives from competing providers. That finding is immaterial to validation of the "turnkey" functionality, and we no longer rely on it.

(4) Other Functionalities

38. In the *Tariff 12 Order*, the Commission identified a functionality in addition to those discussed above. Specifically, the Commission found that integrated service pack-

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65 *Tariff 12 Order*, 4 FCC Rcd at 4937.
66 *Id.*
67 AT&T Comments at 25-26.
68 *Id.* at 26.
69 *Id.* at 27 & AT&T Reply Comments at 39-40.
70 SWB Comments at 3.
71 CNSUG Comments at 24. *See also, e.g.*, Fidelity Comments at 1; Unisys Reply Comments at 2.
72 Du Pont Comments at 3.
73 Ad Hoc Comments at 10.
74 Sprint Comments at 15; Williams Comments at 10, 17. *See also, e.g.*, AmeriCall Comments at 7-8; MCC Comments at 11-12.
75 Sprint Reply Comments at 30-31; Williams Comments at 11-12.
76 Sprint Comments at 17-19; MCI Comments at 11-12.
77 Sprint Comments at 16-17; MCI Comments at 16-17.
78 *See* 35, *supra*.

ages enable the realization of "cost saving efficiencies through the elimination of administrative and engineering functions which would be required in the provision of individual services, such as pre-service review of orders for service impact." [79] MCI charges that elimination of this activity is not a material functionality.[80] We find that, given our identification of several other functionalities which we believe differentiate Tariff 12 from individually tariffed services, a determination as to the materiality of this functionality is not necessary for affirmance of our prior finding that Tariff 12 is not "like" AT&T's individually tariffed services, and we no longer rely on it.

39. In addition, AT&T and other Tariff 12 supporters allege that a number of other functional differences exist between Tariff 12 and AT&T's individual service tariffs. Some commenters allege that network engineering, design, and performance under Tariff 12 is functionally different than under AT&T's other tariffs because the carrier engineers the customer's end-to-end network instead of engineering only individual circuits or services. [81] Opponents counter that this activity is not unique to Tariff 12 because AT&T offers end-to-end design and engineering in conjunction with some of its other tariffed services, such as SKYNET Clearlink Service, Private Line Service, and SDN Service.[82] They also allege that this activity is not generic to Tariff 12 because not all Tariff 12 customers utilize this feature and, when they do, it is in varying degrees.[83]

40. Tariff 12 proponents also claim that network management and operation (as distinct from network monitoring and provisioning) is a functional difference under Tariff 12. AT&T claims that network management and operation functions are inherent in the tariffed VTNS service.[84] AT&T and others assert that, unlike other tariffs, Tariff 12 provides customers with a single point of contact for all Tariff 12 issues,[85] improved information on performance and usage,[86] and a single, customized integrated bill.[87] Tariff 12 opponents dispute the validity of these network management factors. Williams argues that AT&T has never adequately explained how the network management services provided with Tariff 12 differ from the same services AT&T routinely performs for all its large customers.[88] Sprint argues that the provision of a single point of contact to Tariff 12 customers is not an inherent difference in providing Tariff 12 service, but a mere function of AT&T's internal organization.[89] Sprint further notes that this is not a functionality unique to Tariff 12 because AT&T currently provides large nonTariff 12 customers with account teams devoted solely to them.[90] MCI argues that since the tariff does not obligate AT&T to provide a single point of contact, this factor cannot be considered in a likeness determination.[91] CompTel charges that customized billing does not functionally differentiate Tariff 12 from AT&T's other tariffed services because it is not unique to Tariff 12. CompTel claims that AT&T offers specialized billing options to customers of SDN and other services.[92] MCI states that billing features are not found in the tariff and that, moreover, billing is not a communications service under the Act and differences in how a carrier bills two communications services do not affect whether the services are "like" each other.[93]

41. Additionally, AT&T contends that Tariff 12 involves greater carrier customer commitment than do its individual tariffs because Tariff 12 is the only tariff in which a customer commits to a certain minimum level of demand for each of a range of service elements for a fixed period of time, and to overall annual commitments, while AT&T provides this range of integrated capabilities at a tariffed rate during that same period.[94] Sprint and other commenters contend that mutual commitment is not a material differentiating functionality because several of AT&T's individually tariffed services, including SDN, also contain such cross-commitments.[95] AT&T responds that these parties have failed to identify a single individual tariff in which customers and carriers make the type of commitments that are made in Tariff 12. AT&T further argues that the commitments customers make under SDN cannot be meaningfully compared to those made under Tariff 12 because Tariff 12 incorporates a much wider range of capabilities.[96]

42. We found above that three functionalities -- flexible provisioning, network monitoring, and the "turnkey" nature of Tariff 12 service -- functionally distinguish Tariff 12 from AT&T's individually tariffed services. Thus, it is

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[79] *Tariff 12 Order*, 4 FCC Rcd at 4937.

[80] MCI Comments at 16.

[81] *See, e.g.*, AT&T Comments at 19-22 & Reply Comments at 21-24, 26-27; API Comments at 6-10 & Reply Comments at 6-7 & 7 n. 8; Ad Hoc Comments at 14-15; Du Pont Comments at 4.

[82] *See, e.g.*, Williams Reply Comments at 10-11 & 11 nn. 27-28; Sprint Reply Comments at 14-15.

[83] *See, e.g.*, Williams Reply Comments at 13-14; Sprint Reply Comments at 17.

[84] AT&T Reply Comments at 37.

[85] *See, e.g.*, AT&T Comments at 23; EUA Comments at 3-4; Boise Comments at 1; GE Comments at 2; USAir Comments at 2; GSA Reply Comments at 8.

[86] *See, e.g.*, AT&T Comments at 24 & Reply Comments at 33; EUA Comments at 4; SDNUA Comments at 1; GE Comments at 1.

[87] *See, e.g.*, AT&T Comments at 28 & Reply Comments at 34-35; Ad Hoc Comments at 12-13; Du Pont Comments at 3; GSA Reply Comments at 7-8.

[88] Williams Comments at 12.

[89] Sprint Reply Comments at 28.

[90] *Id. See also* MCI Reply Comments at 10-11.

[91] MCI Reply Comments at 10.

[92] CompTel Reply Comments at 19 & n. 14.

[93] MCI Reply Comments at 10 n. 4

[94] AT&T Comments at 28-29 & Reply Comments at 41-43.

[95] *See, e.g.*, Sprint Comments at 19-20; CompTel Comments at 10-11; MCI Comments at 14-15.

Sprint also argues that AT&T's assertion of greater mutual commitments under Tariff 12 between AT&T and the customer contradicts the Commission's prior findings that Tariff 12 involves limited cross-commitments and that greater mutual commitment is characteristic of individually tariffed services. Sprint Reply Comments at 7-8. This argument is without merit. In the *Tariff 12 Order*, the Commission was addressing the limited nature of the cross-commitments between AT&T and the customer with respect to service provisioning. *See Tariff 12 Order*, 4 FCC Rcd at 4937. In response to the *Remand Designation Order*, AT&T is referring to the significantly different cross-commitments described in the text accompanying note 94. Thus, there is no contradiction between the two positions.

[96] AT&T Reply Comments at 43 & n. **.

not necessary to determine whether other alleged functionalities make Tariff 12 functionally different from AT&T's individually tariffed services. Accordingly, we choose not to reach these issues.

c. Summary

43. In sum, we find that certain functionalities from the perspectives of both the nature of the services involved and customer perception of the services, *i.e.*, carrier provisioning control, network monitoring, and the "turnkey" nature of the service, differentiate Tariff 12 from AT&T's individually tariffed services. Accordingly, we affirm the Commission's finding in the *Tariff 12 Order* that integrated service packages in general, and AT&T's Tariff 12 Options 1-4 in particular, are functionally different from, and thus are not "like," AT&T's individually tariffed services. We note that any one of the functionalities specified herein as differentiating Tariff 12 from AT&T's individually tariffed services is sufficient alone and, *a fortiori*, in any combination to support this finding, and emphasize that cost or price considerations played no role whatsoever in our likeness analysis.

C. Analysis of Tariff 12 Integrated Service Packages

44. We also find that, on further analysis, and contrary to our prior decision, Tariff 12 integrated service packages need not be "like" each other for purposes of Section 202(a) of the Communications Act. We further conclude that Tariff 12 Options 1-4, in fact, are not "like" each other.

1. Functional Differences Between Tariff 12 Options

45. As noted in Section III.A.1., *supra*, the first step of our analysis is to determine whether Tariff 12 options are "like" each other for purposes of Section 202(a) using the functional equivalency test.[97] In the *Tariff 12 Order*, the Commission found that Tariff 12 integrated service packages "are ["like" each other] and that carriers must therefore ensure that such packages are generally available to similarly situated customers who request substantially similar packages." [98] The Commission stated that "[w]e based this conclusion upon the fact that the functionalities identified in the previous section which differentiate integrated service packages from disaggregated tariffs are common to all integrated packages." [99] The Commission further stated that such functionalities "are intrinsic to integrated service packages" and "[t]hus, customers of such packages receive the same network functionalities available in other packages.[100]

46. The Commission then found that "[d]ifferences between packages may reflect differences in the terms and conditions under which customers take such packages, but not differences in the fundamental service functionalities available with such a package."[101] By way of example, the Commission noted that while "customers may vary in their minimum volume requirements, their ability to commit to a fixed time term, or the distribution of traffic concentrations associated with their network configuration,... [v]ariations in these aspects of service simply reflect the fact that every customer's service requirements vary according to the specific locations served and may differ from those useful to another customer."[102] The Commission found that "[s]uch differences account for differences among customers' bills or differences among packages in pricing and in availability to customers but do not generally justify characterization of the service obtained by customers as 'unlike.'"[103] The Commission concluded that "[r]egardless of the variation in these factors, the customer still receives the functionalities identified in the previous section which result from integrating a variety of service components into a single offering managed by the carrier."[104]

47. The Court of Appeals concluded that, in light of the Commission's determination that Options 1-4 are "like" each other, the Commission should "'articulate with precision its reasons for tolerating any [price] discrepancies it uncovers.'"[105]

48. In response to the *Remand Designation Order*, AT&T, Tariff 12 customers, and other Tariff 12 supporters are virtually unanimous in arguing that Tariff 12 options

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[97] There is considerable disagreement among the parties as to whether it is permissible for the Commission to reach the likeness issue. For example, Sprint contends, *inter alia*, that the Commission may not re-examine this issue because the Commission's finding in the *Tariff 12 Order* that Tariff 12 options are "like" each other has been fully accepted by all parties and the *Tariff 12 Decision* accepts this finding and requires only that a determination be made as to the reasonableness of the discrimination. Sprint Comments at 29-30. In contrast, AT&T alleges that the Commission did not find that Options 1-4 are "like" each other in the *Tariff 12 Order*. AT&T argues that this issue was never designated for investigation prior to the *Remand Designation Order*. AT&T Reply Comments at 61-62. In support, AT&T cites the Commission's *Remand Designation Order* in which we state that there may be functionalities which might make integrated service packages unlike each other. *Id.* at 62 n. *

We do not believe we are precluded from examining this issue. The Commission's finding in the *Tariff 12 Order* with respect to likeness among packages was limited in scope. As we stated in the *Remand Designation Order*, the Commission previously concluded only that Tariff 12 packages "are 'like' to the extent that the functionalities which distinguish integrated service packages from disaggregated tariffed components are intrinsic to all integrated packages." We further noted that "the Commission [had] not rule[d] out the possibility that there may be functionalities which might make integrated service packages 'unlike' each other." *Remand Designation Order* at 740. Further, the Court of Appeals did not review this aspect of our earlier decision on the merits because, as it recognized, that determination "has not been appealed." *Tariff 12 Decision*, 917 F. 2d at 40. In reviewing the aspects of our analysis that the Court did remand, we believe it is appropriate to analyze anew the threshold issue of likeness in light of the fuller record that has been developed on remand.

[98] *Tariff 12 Order*, 4 FCC Rcd at 4937.

[99] *Id.*

[100] *Id.*

[101] *Id.*

[102] *Id.* at 4937-38.

[103] *Id.* at 4938.

[104] *Id.*

[105] *Tariff 12 Decision*, 917 F.2d at 41 (*quoting MCI v. FCC*, 842 F.2d at 1307).

are not "like" each other.[106] AT&T contends that the customized nature of Tariff 12 offerings, *i.e.*, the design of each particular option, is a functionality that differentiates Tariff 12 options from each other.[107] AT&T states that options can differ in three principal ways: differences in service elements and the mix of service elements, [108] differences in reliability features,[109] and differences in rate structure[110] having nothing to do with overall charges to each customer.[111] AT&T also notes that options are different in terms of overall minimum annual commitments, minimum commitments for each service element, and tradeoffs among rates for service elements.[112]

49. A number of commenters also contend that the customization process inherent in Tariff 12 makes these integrated service packages functionally unequivalent. For example, GE contends that Tariff 12 Options 1-4 are not "like" each other because the terms, conditions, and rate structures for the options differ according to the customers' needs.[113] API asserts that the customization process that distinguishes Tariff 12 options from individually tariffed services also distinguishes Tariff 12 options from each other.[114] GSA contends that the fact that all involve the common denominators of system architecture, term commitments, and volume commitments does not indicate that each package should be priced in an identical manner.[115]

50. In addition, AT&T asserts that, given the general availability of Tariff 12 options, the fact that a new VTNS option is developed is proof that it is "like" no other option. AT&T argues that if existing options had met the new customer's functional needs, the customer would have chosen an existing option.[116] Customer perception supports this view. For example, SDNUA maintains that the very existence of multiple packages is an indication that users perceive them to be different, because otherwise users would not spend the "interminable" time it takes to negotiate a new option and wait for it to become effective.[117] CNSUG contends that the fact that two-thirds of Tariff 12 customers have negotiated their own options strongly suggests that customers perceive important differences between them.[118] GE also argues that the general availability of existing options means that customers who choose to negotiate new options perceive that the existing options do not meet their functional needs.[119]

51. In contrast, MCI and other Tariff 12 opponents agree that Tariff 12 options are "like" each other. MCI claims that a cornerstone of the Commission's initial approval of Tariff 12 was its insistence that AT&T not hide behind non-material differences in minimum volume levels, time commitments, relative package prices, and the mix of services requested. MCI contends that AT&T has not made any showing that the differences among the options are anything more than what the Commission regarded as insubstantial differences.[120] MCI argues that such differences among options are not functional differences but merely differences in the terms and conditions on which customers purchase services providing equivalent functionality.[121] Sprint alleges that AT&T's arguments rest on immaterial features and impermissible price-based factors, and disputes AT&T's claim that Tariff 12 customers' statements and actions provide extensive evidence that Tariff 12 packages are not "like" each other.[122]

52. After reviewing the record, as supplemented herein, and on further analysis, we now conclude that, contrary to our prior decision, integrated service packages need not be "like" each other for purposes of Section 202(a) of the Communications Act. We further conclude that Tariff 12 Options 1-4, in fact, are not "like." The proper frame of reference in evaluating the likeness of such packages vis-a-vis other packages is to look at the function of the package as a whole: Is the package, as a whole, functionally equivalent to other, individually negotiated packages? Viewed in this light, the four Tariff 12 options at issue in this remand proceeding are not "like." [123]

53. We note at the outset that the very nature of integrated service packages results in an expectation that in most instances the packages will not be "like." Such packages generally result from an extensive negotiation process between AT&T and the option customer. Given the nature of the process, and the varying needs and perspectives of each customer, it is inevitable that the negotiations involve numerous variables, the number and combination of which will differ from customer to customer. For example, packages may contain various types of transmission capabilities such as ports[124] and Data

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[106] An exception is MCI, a customer of Option 23, and also a carrier-provider of competing services to customers, which contends that Tariff 12 options are "like" each other. *See* 51, *infra*.

[107] AT&T Comments at 58 & Reply Comments at 66-67.

[108] *See* AT&T Comments at 60-63 & Reply Comments at 72-77 for a discussion of the differences among options with respect to service elements.

[109] *See* AT&T Comments at 63-64 & Reply Comments at 72-77 for a discussion of the differences among options with respect to reliability features.

[110] *See* AT&T Comments at 64-66 & Reply Comments at 72-77 for a discussion of the differences among options with respect to rate structures.

[111] AT&T Comments at 59 & Reply Comments at 70.

[112] AT&T Comments at 72.

[113] GE Comments at 2.

[114] API Comments at 14 & Reply Comments at 11.

[115] GSA Comments at 7.

[116] AT&T Comments at 56 & Reply Comments at 67-68.

[117] SDNUA Comments at 2.

[118] CNSUG Comments at 33.

[119] GE Comments at 2. *See also* API Comments at 11; Ad Hoc Comments at 19-20.

[120] MCI Reply Comments at 25-26.

[121] *Id.* at 27.

[122] Sprint Reply Comments at 40-41. *See also* CompTel Reply Comments at 30-31; AmeriCall Reply Comments at 10-11.

[123] Having determined in the *Tariff 12 Order* that integrated service packages were stand-alone services functionally distinct from a simple aggregation of component service features, the Commission inconsistently focused solely on the capabilities common to all packages, rather than considering the total service capabilities of each package, when the Commission stated that such packages were "like" each other. *See Tariff 12 Order*, 4 FCC Rcd at 4937.

[124] Ports provide the ability to originate or terminate voice-equivalent traffic. Except for Option 1, ports are of two types: measured ports, which are placed at locations that can be directly connected to AT&T's network, and measured remote ports, which are placed at remote locations that require an access arrangement to connect to AT&T's network. Both are

Transmission Capabilities (DTCs),[125] a variety of bit rate capacities for transmission lines,[126] as well as features such as diverse routing,[127] authorization code calling,[128] availability objectives,[129] and numerous other service features. Since all options are generally available to prospective customers who want them, a customer's decision not to take an existing option, and instead to negotiate a new option, provides strong evidence that each new offering meets a significant need or priority that, in the customer's view, is not available from existing options.[130]

54. Our review of the record in this proceeding confirms this expectation. Each Tariff 12 package is, by its terms, generally available to similarly situated customers,[131] yet nevertheless is in the first instance customized to meet the individualized non-price-related needs of a specific customer.[132] The record sustains the assertions by AT&T and numerous customers of Tariff 12 services that the customization reflected in Options 1 through 4 includes significant non-price related differences of the kinds noted above. Options 1-4 provide examples of how customers individually negotiate specific terms and features that render the packages unlike each other.

55. For example, Option 1 is the only option that contains basic ports and basic remote ports. [133] Therefore, Options 2, 3, and 4 would not meet the needs of the Option 1 customer. Option 2 specifies diverse routing of approximately 50 percent of the DTCs over two physically separate routes. Thus, Options 1, 3, and 4, which do not require diverse routing, would not be functionally suitable for the Option 2 customer. [134] Options 1 and 3 contain a large percentage of low-capacity DTCs (approximately 90 percent operate at speeds of less than 54 kbps), which enables transmission of relatively small quantities of data at lower speeds from many locations. In contrast, Options 2 and 4 contain a large percentage of high-capacity DTCs (approximately 90 percent operate at speeds of 54 kbps or higher), which enables transmission of relatively large quantities of data at higher speeds from a small number of locations. [135] Thus, Options 1 and 3 would not serve the needs of the customers for whom Options 2 and 4 were originally designed. [136]

56. The different mixes in communications capabilities reflected in each of these Tariff 12 service offerings makes each option, properly viewed as a whole, functionally different. Each is designed to meet different overall communications needs, a fact that is confirmed by the perceptions of the Tariff 12 customers. The customers of these (and other) Tariff 12 packages have with virtual uniformity stated that they perceive the packages under consideration here to be distinct and non-substitutable, without regard to price. [137] For example, SDNUA asserts that "[t]he very existence of the multiple packages is an indication that users perceive them to be different. If not, users would not spend the interminable time it takes to put together a new tariff and wait for it to become effective. The various packages have been requested by companies as necessary for their various needs; the terms and rate structures vary according to those needs. Since customers have selected different options and negotiated different options, clearly this is an indication that the options are different." [138] Other customers support this view.[139]

57. Accordingly, we conclude that Options 1 through 4 are not "like" each other for purposes of Section 202(a).[140]

D. Remaining Designation Issues

58. In the *Initial Designation Orders*, [141] the Commission designated a number of issues in addition to those discussed *supra*. These issues are: (1) whether Tariff 12 Options 1-4 are generally available, (2) whether these options comply with the private line guidelines, and (3) whether these options comply with the Commission's policy prohibiting restrictions on resale and shared use. The Commission elected not to reach these issues in the *Tariff 12 Order* because it found the tariffs under investigation to be unlawful.[142] Specifically, the Commission found that these tariffs were not generally available to similarly situ-

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used to originate or terminate only measured traffic. *See* AT&T Comments at 60 & n.*; Transmittal 1018 D&J at 5-6. In addition, Option 1 contains basic ports, which are located at a hub (traffic concentration point) and are used to originate calls to both other hubs and non-hub locations, and basic remote ports, which are located at remote locations and are used to originate calls that are routed through a hub. AT&T Comments at 60 & n. *; AT&T Transmittal 1018 D&J at 5-6.

125 DTCs provide data transmission paths between customer-designated locations independently of AT&T's switched network. AT&T Comments at 60.

126 Bit rate capacities range from 9.6 kbps to 1.544 Mbps.

127 Routing diversity means that transmission channels are routed over two physically diverse separate routes between the AT&T central office and a customer-designated location to reduce the risk that network communications between those locations will be totally disrupted. AT&T Comments at 63.

128 Authorization codes permit calls to originate and terminate at locations not designated by the customer.

129 Service availability is the percentage of time ports and DTCs are available (not interrupted) to the customer. *See, e.g.*, AT&T Tariff F.C.C. No. 12, § 7.4.1.C, Availability Objectives.

130 *See* 50, *supra*.

131 *See* Section III. D. 2., *infra*.

132 *See, e.g.*, AT&T Reply Comments at 66; SCG Comments at 4; Ad Hoc Comments at 19-21; API Comments at 14; CNSUG Comments at 6; SDNUA Comments at 2; GE Comments at 2.

133 AT&T Comments at 60 n. *.

134 AT&T Comments at 63-64; AT&T Transmittal 1145 D&J at 5.

135 AT&T Comments at 62-63.

136 AT&T Comments at 63.

137 *See, e.g.*, AT&T Reply Comments at 67-72. *See also* note 132, *supra*. *But see* note 106, *supra*.

138 SDNUA Comments at 2. *See also* note 117, *supra*.

139 *See* 50, *supra*. *See also* note 132, *supra*.

140 We do not reach the question of whether Tariff 12 packages other than the four options directly under consideration are "like" or unlike. In light of our analysis in this proceeding, however, our expectation is that all Tariff 12 packages will serve separate and distinct customer needs and will be unlike each other.

141 AT&T Communications, Transmittal Nos. 895 and 961, Order Designating Issues for Investigation, 2 FCC Rcd 7389, 7390-92 (Com. Car. Bur. 1987) (*DTSN Designation Order*); AT&T Communications, Transmittal Nos. 1018 and 1102, Memorandum Opinion and Order, 3 FCC Rcd 995, 998-99 (Com. Car. Bur. 1988) (*VTNS Designation Order*) (collectively, *Initial Designation Orders*).

142 *See Tariff 12 Order*, 4 FCC Rcd at 4938; *Reconsideration Order*, 4 FCC Rcd at 7930. *See also Tariff 12 Decision*, 917 F.2d at 41.

ated customers as a result of geographic restrictions.[143] The Commission thus required AT&T to either refile the tariffs without these restrictions or withdraw the offerings.[144] In the *Tariff 12 Decision*, the Court held the Commission's justification to be inadequate because although "an agency does not automatically have to reach every issue whose importance it has noted and on which it has conducted a hearing," if the agency opts not to reach such an issue, the agency must provide an acceptable explanation for its decision.[145] The Court stated that an agency "cannot simply decline to reach an issue after it holds a hearing.[146] Consequently, the Court ordered us to either reach the issues designated for investigation or provide an adequate explanation for not doing so. [147]

1. Necessity to Reach

59. In the *Remand Designation Order*, we requested comments on whether the Commission is required to decide the remaining issues originally designated for investigation in this docket. [148] Some commenters argue that the Commission must address these issues in this proceeding because the Commission has not identified an acceptable reason for not resolving them. [149] AT&T argues that we need not reach these issues. AT&T asserts that the Commission declined to address these additional issues not because it had held Options 1-4 unlawful on narrow grounds but because the guidelines adopted by the Commission in the *Tariff 12 Order* made it unnecessary and wasteful to address those issues further. [150] We address below the issues of general availability and compliance with the Commission's resale and shared use requirements, but find that the question of compliance with the private line guidelines was improvidently designated and need not be reached.

2. General Availability Obligation

60. In the *Remand Designation Order*, the Commission requested comments on whether AT&T is required to make Tariff 12 Options 1-4 as generally available as possible and, if AT&T is so obligated, whether AT&T has satisfied this requirement. [151] The commenters agree that AT&T must make Tariff 12 generally available to avoid unreasonable discrimination among similarly situated customers. They disagree, however, as to the nature and extent of AT&T's general availability obligation.

61. AT&T and others argue that AT&T is obligated, pursuant to *Sea-Land* [152] and the *Tariff 12 Decision*, to make these packages "generally available to similarly situated customers." [153] AT&T asserts that all Tariff 12 options, including Options 1-4, satisfy this obligation. Each package, says AT&T, has no geographic restrictions on availability and is structured to ensure that it remains generally available to both current and prospective customers with insubstantial variations in needs. [154]

62. Opponents of Tariff 12 dispute AT&T's claim, with many insisting that AT&T is obligated to make the Tariff 12 offerings "as generally available as possible."[155] Most argue that the removal of the geographic restrictions was merely a "cosmetic change" that does not render these options generally available.[156] Sprint asserts that both the Commission and the courts have held that in order for tariffs to accomplish their regulatory purpose in preventing unlawful discrimination, carriers must offer service at rates, terms, and conditions which are universally available. Sprint contends that individual tariffs limited to specific customers would be of very little assistance to the Commission because such tariffs would not enable the Commission to make the comparisons which underlie structural tests for unlawful discrimination.[157] Sprint and other commenters assert that AT&T has not satisfied this general availability obligation.[158]

63. Sprint, Williams, and others cite the Commission's decision in the *DS3 Order*[159] as illustrative of the Commission's position on the duty that Section 202(a) of the Communications Act imposes upon carriers. [160] These parties argue that in the *DS3 Order*, the Commission found that individual case basis (ICB) pricing of DS3 service by certain local exchange carriers was unreasonably discriminatory in violation of the Communications Act. The Commission had permitted the use of ICB rates for certain services that telephone companies had not offered prior to the divestiture of the Bell System. The Common Carrier Bureau had expressed concern that the continued use of ICB pricing for DS3 services might no longer be justified. [161] The Commission observed that ICB pricing "represents a departure from the normal practice in the telecommunications industry" under which "pricing options for a particular service . . . are usually described in a tariff that is generally available to anyone who elects to take a particular option." [162] Furthermore,

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143 *Tariff 12 Order*, 4 FCC Rcd at 4938.
144 *Id.* at 4938-39.
145 *Tariff 12 Decision*, 917 F.2d at 41.
146 *Id.*
147 *Id.* at 41-42.
148 *Remand Designation Order*, 6 FCC Rcd at 741.
149 MCI Comments at 25-26; Sprint Comments at 36-38; CompTel Comments at 23-25; Williams Comments at 27; MCC Comments at 24-26; AmeriCall Comments at 12-13; CNSUG Comments at 34 (resolution required only of general availability and resale issues); GSA Reply Comments at 13-14; One Call Reply Comments at 10-11.
150 AT&T Comments at 75-80.
151 *Remand Designation Order*, 6 FCC Rcd at 741.
152 *Sea-Land Service, Inc. v. ICC*, 738 F. 2d 1311 (D.C. Cir. 1984) (*SeaLand*).
153 AT&T Comments at 80-82; Ad Hoc Comments at 26-28; API Reply Comments at 15.
154 AT&T Comments at 81-82.
155 MCI Comments at 26; Sprint Comments at 40; Williams Comments at 29; IDCMA Comments at 13; MCC Comments at 26.
156 CompTel Comments at 28. *See also* Sprint Comments at 40-45; MCI Comments at 26; IDCMA at 14-15; Williams Comments at 31; AmeriCall Comments at 13-14; MCC Comments at 27; One Call Reply Comments at 11.
157 Sprint Comments at 40-41.
158 *Id.* at 40-45. *See also* note 156, *supra*.
159 Local Exchange Carriers' Individual Case Basis DS3 Service Offerings, Memorandum Opinion and Order, 4 FCC Rcd 8634 (1989) (*DS3 Order*), *recon. denied*, 5 FCC Rcd 4842 (1990), *further recon. pending*.
160 Sprint Comments at 41-44; Williams Comments at 29-30; IDCMA Comments at 14; MCC Reply Comments at 22-23. *See also* MCI Comments at 28 (discussing *DS3 Order* in the context of the private line guidelines).
161 *DS3 Order*, 4 FCC Rcd at 8634.
162 Sprint Comments at 41 (*citing DS3 Order*, 4 FCC Rcd at 8641-42).

the Commission found that, although "[i]t might theoretically be possible to devise a scheme for developing individual rates for each facility that does not produce discrimination,... it would be extremely difficult to establish a scheme that would produce individual facility rates that are rationally related to each other in some manner that is fair, just, and reasonable." [163] Consequently, the Commission found these DS3 services to be unreasonably discriminatory and therefore unlawful, and ordered the local exchange carriers to convert all ICB rates for DS3 services to nondiscriminatory, generally available rates.[164] Sprint contends that the Commission's conclusions in the *DS3 Order*, read with the Commission's *Tariff 12 Order*, make it quite clear that dominant carriers cannot restrict individual services for particular customers. Sprint charges that this is exactly what AT&T is attempting to do. Sprint and IDCMA assert that instead of so restricting its Tariff 12 service, AT&T must provide service pursuant to more generic tariffs employing rates which are available to all customers.[165] Furthermore, says Williams, if ICB DS3 filings are unlawful because they are not, for practical purposes, generally available, then Tariff 12 offerings are "doubly unlawful."[166]

64. AT&T responds that the Communications Act requires only that AT&T make its Tariff 12 options available to any customer who is "willing and able to meet the contractual terms" and who is similarly situated in terms of costs of service or competitive conditions.[167] AT&T further asserts that the Commission's *DS3 Order* does not hold otherwise and has no pertinence to Tariff 12. AT&T insists that each individual Tariff 12 option is generally available, as the DS3 contracts were not. Therefore, concludes AT&T, Tariff 12 plainly fits the Commission's description of the "normal practice in the telecommunications industry" because each option is "described in a tariff that is generally available to anyone who elects to take a particular option." [168]

65. AT&T also asserts that, contrary to the contentions of opponents, numerous customers are taking service under options originally created for others. AT&T claims that there are at least 122 customers using AT&T's 78 active Tariff 12 options.[169] Tariff 12 customers concur in this assertion. For example, API attests that none of its member companies is aware of instances where AT&T has refused to respond to a request for proposal for a custom network or has restricted the availability of Tariff 12 to selected customers or groups of customers.[170]

66. We do not agree with Sprint's contention that common carriers are limited to generic tariff offerings. Sprint appears to confuse a generally available tariff offering with a generally useful tariff offering. A common carrier may supplement its generic offerings with offerings that are designed to meet the needs of a particular customer or limited number of customers without violating the unreasonable discrimination prohibition if that carrier makes that more customized offering available to anyone who might find it useful and the offering is not otherwise unlawfully discriminatory. This is the essential holding in *Sea-Land*. That Court said that "individualized contract rates can still be accommodated to the principle of nondiscrimination by requiring a carrier offering such rates to make them available to any shipper willing and able to meet the contract's terms." [171] That Court also observed that shippers who are unwilling or unable to meet the contract terms are not similarly situated with customers who are willing and able to do so.[172] The Commission's *Tariff 12 Order* and the Court of Appeals' *Tariff 12 Decision* both endorsed the reasoning in the *Sea-Land* opinion and thus effectively rejected any contention that Section 202(a) restricts common carriers to generic offerings.[173] Sprint and others are attempting to reargue a question that has already been resolved insofar as they attempt to equate generally available offerings with generally useful offerings.

67. We are also not persuaded by claims that the *DS3 Order* conflicts with our decision, or the Court of Appeals' decisions, holding that common carriers are not confined to generic offerings. The *DS3 Order* did not find the individualized case basis or ICB offerings unlawful because the offerings are not generic. The offerings were unlawful because none of the ICB offerings were available to similarly situated or even identically situated customers.[174] Those carriers devised a separate price for *each* DS3 facility that was provided to each customer. An individual case basis offering is not, by definition, generally available.

68. The Court of Appeals remanded a related but somewhat different question when the Court directed this Commission to determine whether AT&T has complied with that carrier's general availability obligation. Although the *Tariff 12 Order* concluded that AT&T may tariff offerings that are designed to fit a particular customer's needs, the *Tariff 12 Order* also concluded that AT&T cannot include artificial constraints that would preclude other customers from using the offering.[175] The inclusion of such restrictions violates the carrier's obligation to make the offering available to any customer who might be able to use it, *i.e.*, the duty to make the offering generally available. [176] The *Tariff 12 Order* concluded that geographic restrictions in the initial options did create

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[163] *Id.* at 41-42 (*citing DS3 Order*, 4 FCC Rcd at 8642).
[164] *DS3 Order*, 4 FCC Rcd at 8645.
[165] Sprint Comments at 42; IDCMA Comments at 14. Sprint also argues that from its inception Tariff 12 was intended to be a customized offering, referencing Transmittal No. 895, General Electric Telecommunications Network Service (GETN). Sprint Comments at 42-43. The service was subsequently renamed Digital Tandem Switched Network Services (DTSN) under Transmittal No. 961.
[166] Williams Comments at 30.
[167] AT&T Reply Comments at 89 (*citing Tariff 12 Decision*, 917 F.2d at 3738; *Sea-Land*, 738 F.2d at 1317).
[168] *Id.* at 89 n. *** (*citing DS3 Order*, 4 FCC Rcd at 8641-42).
[169] *Id.* at 91. (Options 1-4, however, do not have multiple customers.)
[170] API Comments at 18. *See also* Ad Hoc Comments at 27-28; SCG Comments at 5; EUA Comments at 7; CNSUG Comments at 35; GSA Reply Comments at 14-15.
[171] *Sea-Land*, 738 F.2d at 1317.
[172] *Id.*
[173] *See Tariff 12 Order*, 4 FCC Rcd at 4938; *Tariff 12 Decision*, 917 F.2d at 38.
[174] *DS3 Order*, 4 FCC Rcd at 8642.
[175] *Tariff 12 Order*, 4 FCC Rcd at 4934-35.
[176] *Id.* at 4938.

artificial and unnecessary constraints on availability that violated AT&T's obligation to make those options generally available and accordingly declared the tariffs unlawful.[177] The *Tariff 12 Order* also noted that the options might contain other unnecessary restrictions, but concluded that it would not be necessary to make that determination.[178]

69. The Court of Appeals concluded that the Commission had not adequately justified its decision not to reach the issue of whether the options contain any other restrictions that violate AT&T's duty to make the offerings generally available. The Court directed us either to make that determination in the remand proceeding or to provide an "adequate explanation" for not doing so.[179] We have re-examined the tariff terms and conditions and we do not find any provision in Options 1-4 that would appear to impose any artificial constraints that would foreclose a similarly situated customer from ordering the same or substantially similar service under the options. Further, the pleadings that have been filed in the remand proceeding do not identify any provision in these options that arguably would result in an undue restriction upon the availability of the options. In addition, every Tariff 12 option specifically states that it is "generally available to Customers under conditions not substantially different from those specified" in the option.[180] The Tariff 12 General Regulations also mandate the general availability of every Tariff 12 option.[181] Accordingly, we find that Tariff 12 Options 1-4 are generally available.

3. Private Line Guidelines

70. The *VTNS Designation Order* directed AT&T to "provide additional information in support of its view that VTNS, Option 1, is in compliance with the Commission's Private Line Guidelines."[182] The *Tariff 12 Order* did not determine whether any option did or did not comply with the private line guidelines. The *Tariff 12 Decision* directed us to resolve that question or explain why we decided a resolution is unnecessary.[183] The *Remand Designation Order* requested comments on whether Options 1-4 comply with these guidelines.[184]

71. The threshold issue is whether the private line guidelines[185] are applicable to Tariff 12 options. AT&T, Ad Hoc, and others insist that compliance with the guidelines is optional.[186] AT&T argues that the guidelines are inapplicable for two reasons. First, says AT&T, the options are not private line offerings and are not "like" private line offerings.[187] Ad Hoc concurs in this evaluation, asserting that Tariff 12 options are not private line services, but integrated services encompassing a variety of voice and data capabilities, which are functionally different from private line "piece-part" services. Ad Hoc asserts that specific functionalities cannot be artificially segregated for treatment as private lines under the guidelines. Ad Hoc also argues that, unlike private line services, AT&T has the discretion to use shared facilities as well as dedicated facilities for any of the functionalities incorporated within Tariff 12.[188]

72. AT&T notes that the Commission has held that it is not a violation of the Communications Act or the Commission's regulations for a carrier to develop new services that integrate capabilities that were formerly provided, or that can be provided in part, through private line services.[189] AT&T and other supporters of Tariff 12 insist that the guidelines merely suggest ways in which carriers can structure private line rates.[190] Furthermore, some commenters argue that the primary function of the guidelines is to permit a carrier to provide reduced cost support justification or to act as a "surrogate" for full cost-justification.[191] AT&T claims that it has never invoked the guidelines to reduce its burden of cost justification with respect to Tariff 12 options and therefore the guidelines are irrelevant.[192]

73. AT&T asserts that even if the guidelines apply here, AT&T has previously demonstrated that the options are in compliance with the guidelines.[193] AT&T also argues that the private line guidelines provide no basis for invalidating Tariff 12 or any of the four options at issue here.[194] Other proponents of Tariff 12 allege that Option 1-4 are not incompatible with the guidelines.[195] Specifically, supporters of Tariff 12 urge that even if the guidelines applied to Tariff 12 options, a rigid application would be inappropriate, since the guidelines are intended as one of

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177 *Id.*

178 *Id.* at 4939 n. 70.

179 *Tariff 12 Decision*, 917 F.2d at 41-42.

180 *See, e.g.*, AT&T Tariff F.C.C. No. 12, §§ 7.3, 7.4, 7.5, 7.6 (Options 1-4).

181 *See* AT&T Tariff F.C.C. No. 12, § 7.1. AT&T's assertion that there are multiple customers for the 78 active Tariff 12 options further indicates that Tariff 12 options are generally available. *See* 65 and note 169, *supra*.

182 *VTNS Designation Order*, 3 FCC Rcd at 999.

183 *Tariff 12 Decision*, 917 F.2d at 41-42.

184 *Remand Designation Order*, 6 FCC Rcd at 741.

185 Private Line Rate Structure and Volume Discount Practices, 97 FCC 2d 923 (1984) (*Private Line Guidelines Order*); 47 C.F.R. § 61.40 (1990).

186 AT&T Comments at 82; Ad Hoc Comments at 28; CNSUG Comments at 35; API Comments at 21; GSA Reply Comments at 15. AT&T argues that the Commission explained in the *Reconsideration Order*, and the Commission's counsel stated on appeal, that the private line guidelines are just that -- guidelines, not mandatory, substantive rules. AT&T Comments at 83. AT&T also notes that two opponents of Tariff 12, MCI and AmeriCall, concede that the guidelines are not mandatory. AT&T Reply Comments at 95.

187 AT&T Comments at 82.

188 Ad Hoc Comments at 28. *See also* AT&T Reply Comments at 97.

189 AT&T Comments at 82 n. *** (*citing* In the Matter of AT&T Communications Tariff F.C.C. Nos. 1, 9, and 10, 5 FCC Rcd 298, 301 (1990)).

190 CNSUG Comments at 35-36. *See also* AT&T Comments at 83; API Comments at 20-21.

191 AT&T Reply Comments at 95-96; AmeriCall Comments at 15; API Comments at 21.

192 AT&T Comments at 82. MCI also recognizes that AT&T has never invoked the guidelines to reduce its burden of cost justification for VTNS. MCI Reply Comments at 31-32.

193 AT&T Comments at 82 & n. ** (*citing* Reply of AT&T, Transmittal No. 1018, filed October 19, 1987, 13-18; Direct Case of AT&T, CC Docket No. 87-568, filed March 25, 1988 (AT&T Direct Case)). In its Direct Case, AT&T addresses each guideline and attempts to demonstrate how VTNS offerings comply.

194 AT&T Reply Comments at 94.

195 API Reply Comments at 17. *See also* Ad Hoc Comments at 29; CNSUG Comments at 37.

"a variety of tools to determine whether a carrier's private line tariffs are just, reasonable, and nondiscriminatory."[196]

74. Sprint insists that compliance with the private line guidelines is mandatory.[197] Sprint disputes AT&T's contention that the Commission believes that the sole function of the guidelines is to ease the burden of tariff justification on those carriers who do not comply. Sprint argues that, to the contrary, the Commission states that "those guidelines were adopted as 'guidelines' in a literal sense, to instruct carriers how to design private line tariffs in a way that would make it easier for this Commission to determine whether terms and charges are reasonable and nondiscriminatory."[198] Moreover, Sprint contends that regardless of whether Tariff 12 options do or do not consist entirely of private line services, and regardless of whether the guidelines are permissive or mandatory, there can be no question that these guidelines reflect well-established tariff principles.[199] Sprint claims that the Commission did not seek in the private line guidelines to break new ground but simply to codify requirements that were well understood and that had been used for many years to enforce Sections 201 and 202 of the Communications Act.[200]

75. MCI, CompTel, AmeriCall, and MCC aver that while compliance with the guidelines is optional, the guidelines are relevant.[201] MCI and CompTel assert that the guidelines articulate basic, unobjectionable criteria to ensure that tariffs do not violate Section 202(a) of the Communications Act, *i.e.*, tariffs should be based on building blocks without unnecessary bundling, employ consistent rate structures and elements, and be simple and easy to understand.[202] All four commenters argue that, at a minimum, the Commission must provide a reasonable explanation for its decision to allow a dominant carrier to adopt a tariff that is incompatible with the guidelines.[203] These commenters also allege that departures from the guidelines, or any supposed inability to compare the terms and conditions of "like" services, force the Commission to find that AT&T has not carried its burden to justify price differences and to hold that the tariffs are unlawful.[204]

76. We believe the Bureau's decision to designate this question as a separate issue for investigation was improvident. The private line guidelines were designed for generic tariffs and accordingly are not likely to be useful in evaluating custom offerings. Even when those guidelines have been used for the intended purpose of evaluating generic private line tariffs, the Commission has the discretion to apply the private line guidelines flexibly in light of the facts of a particular proposal.[205] They are, after all, guidelines rather than prescribed requirements. The guidelines themselves make this explicit, stating that "the carrier's burden of cost justification can be reduced when its private line rate structures comply with the following five guidelines."[206] Failure to conform to the guidelines does not render a tariff unlawful, since the rules permit a carrier to justify its departure from the guidelines and to establish that the tariff is just, reasonable, and nondiscriminatory.[207] Noncompliance may provide a flag alerting the Commission to the possibility of unlawful discrimination. However, the guidelines do not, standing alone, prescribe independent substantive standards that tariffs must meet to be lawful.

77. The question of compliance with the private line guidelines is redundant inasmuch as noncompliance would at most indicate a possibility of unlawful discrimination that warrants investigation. We have conducted a full investigation and have determined in the preceding sections that these offerings do not result in unreasonable discrimination between Tariff 12 services and other services or unreasonable discrimination among Tariff 12 options. In these circumstances, a determination as to whether that the options comply with the private line guidelines would not serve a useful purpose.

4. Resale and Shared Use

78. The *VTNS Designation Order* also directed AT&T to respond to several questions generally relating to the resale of Tariff 12 service packages.[208] The questions that the Bureau selected suggest that it may be difficult for resellers to use the Tariff 12 options and that such a result would conflict with policies the Commission adopted in the *Resale and Shared Use Order*.[209] The *Tariff 12 Order* did not directly address those questions and the *Tariff 12 Decision* directed us to resolve those questions or to explain our reasons for not doing so.[210] The *Remand Designation Order* requested comment on this issue.[211]

79. Advocates of Tariff 12 argue that Tariff 12 options generally, and Options 1-4 specifically, fully satisfy the Commission's resale and shared use policy.[212] First, says AT&T, the general availability requirement obligates AT&T to make Tariff 12 options available to any similarly situated party, including a pure reseller.[213] Not only do these options contain no direct restrictions on resale or sharing, notes AT&T, but the general regulations of the

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196 Ad Hoc Comments at 29 (*quoting* 47 C.F.R. § 61.40(a)). *See also* API Comments at 21.

197 Sprint Reply Comments at 48. *See also* Williams Comments at 33; One Call Reply Comments at 11.

198 Sprint Reply Comments at 48 & n. 17 (*quoting Reconsideration Order*, 4 FCC Rcd at 7930).

199 *Id.* at 48.

200 *Id.* at 48-49.

201 MCI Comments at 28; CompTel Comments at 31-32; AmeriCall Comments at 15; MCC Comments at 28.

202 MCI Reply Comments at 32; CompTel Comments at 31. *See also* Sprint Comments at 48; AmeriCall Comments at 15.

203 MCI Comments at 28; CompTel Comments at 31-32; AmeriCall Comments at 15; MCC Reply Comments at 24.

204 MCI Reply Comments at 32; CompTel Comments at 31-32; AmeriCall Comments at 15; MCC Reply Comments at 25.

205 *Private Line Guidelines Order*, 97 FCC2d at 925.

206 47 C.F.R. § 61.40(a). *See also Private Line Guidelines Order*, 97 FCC2d at 926.

207 47 C.F.R. § 61.40(b).

208 *VTNS Designation Order*, 3 FCC Rcd at 999.

209 Regulatory Policies Concerning Resale and Shared Use of Common Carrier Domestic Public Switched Network Services, 83 FCC2d 167 (1980) (*Resale and Shared Use Order*), *recon. denied*, 86 FCC2d 820 (1981).

210 *Tariff 12 Decision*, 917 F.2d at 41-42.

211 *Remand Designation Order*, 6 FCC Rcd at 741.

212 AT&T Comments at 84; Ad Hoc Comments at 29-30; Du Pont Comments at 5; API Comments at 19; US West Comments at 10; GSA Reply Comments at 15.

213 AT&T Comments at 84.

tariff, applicable to all Tariff 12 options, state that Tariff 12 options may be resold or shared. [214] AT&T and Ad Hoc also point to Section 7.1 of Tariff 12 which expressly provides that AT&T "will. .. design[]" an option for any customer, which they claim necessarily includes "entities who want to use VTNS solely for resale or sharing."[215] AT&T further argues that Tariff 12 options do not indirectly restrict resale or sharing. AT&T contends that any Tariff 12 customer who desires to resell can do so by disaggregating AT&T's Tariff 12 charges and allocating them to voice and data as it sees fit. AT&T argues that the customer can thereby determine whether it could profitably resell the capabilities of an option and that having to perform such calculations in no way prevents a customer from reselling. AT&T alleges that such assessments are simply a cost of doing business in the industry and this, standing alone, is not a violation of the resale policy. [216]

80. AT&T and other proponents of Tariff 12 cite instances of sharing or reselling by several Tariff 12 customers, asserting that these facts demonstrate AT&T's compliance with the Commission's resale and shared use. policies.[217] Specifically, AT&T notes that in addition to the fifteen customers currently sharing Option 51 and the twelve other customers that AT&T knows are sharing and/or reselling portions of their service, Ad Hoc indicates that two of its members who are Tariff 12 customers are also doing so.[218] Du Pont, the original customer for Option 1,[219] states that it does not feel any restrictions regarding its ability to resell Tariff 12 service. In fact, says Du Pont, the company was approached about doing just that, but declined for independent business reasons, even though AT&T had confirmed for Du Pont that it was free to do so.[220]

81. Opponents of Tariff 12 claim that Tariff 12 offerings do not comply with the Commission's prohibitions on restrictions on resale and shared use for several reasons.[221] MCC and Sprint argue that the Commission cannot merely accept at face value pretextual assertions that the stated conditions in Tariff 12 guarantee that there is no prohibition of resale.[222] Williams charges that the Commission's prohibition against resale restrictions applies to indirect restrictions achieved via unreasonable rate structures and conditions which are present here.[223] Other commenters allege that the provisions in Tariff 12 which prohibit restrictions on resale do not guarantee the ability of the options to be resold or shared. [224] Sprint argues that restrictions on resale do not need to be explicitly stated to exist because such restrictions are inherent in Tariff 12, since each option is customerspecific and will not be resold or shared unless the customer is willing to do so and unless AT&T designs the offering to permit resale or sharing.[225] CNSUG asserts that while the present options reflect substantial compliance with Commission policies on resale and shared use, the "spirit is weak," since AT&T,2, like its competitors, refuses to extend itself in order to facilitate resale. [226]

82. MCC also argues that resellers cannot secure the deeply discounted rates available to a single large user, and that the deep discounts of the options are unavailable to customers for service procured through providers who sell packaged services in competition with AT&T, adding their own untariffed network management services to resold or customer-procured AT&T communications services.[227] MCI alleges that any ability to resell Tariff 12 options is purely fortuitous. [228] MCI states that it is aware of only one Tariff 12 customer that has attempted to resell Tariff 12 services, and that is the customer for which the option was originally designed rather than another company that sought to take advantage of the special discounting. [229]

83. Sprint argues that in spite of the fact that there may be a few options designed for resale or shared use, resale and sharing work to prevent discrimination only if AT&T is required to sell the service in question to those who will use the service to compete with AT&T.[230] Sprint urges that compliance with the Commission's resale and shared use policies requires the Commission to force AT&T to permit resale of its service in all cases, even if AT&T does not want to deal with a particular customer that AT&T fears will resell AT&T's service in competition with AT&T.[231]

84. In the *Tariff 12 Order*, the Commission directed that any revised Tariff 12 filings "not impose arbitrary limits on. .. availability" and "compl[y] with our existing tariff requirements and policies, including our prohibition against unreasonable restrictions on resale."[232] In the *Reconsideration Order*, the Commission reiterated the importance of this requirement, explaining that Tariff 12 offerings must "be generally available ... not only to forestall unreasonable discrimination but also to further our policies prohibiting restrictions on resale and shared use." [233]

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214 *Id.* at 84-85. *See also* Ad Hoc Comments at 29.

215 AT&T Reply Comments at 100; Ad Hoc Comments at 30.

216 AT&T Comments at 85 (*citing* Telecomm Xpress, Inc. v. MCI Telecommunications Corporation, 2 FCC Rcd 577,578 (Com. Car. Bur. 1987); *accord* MCI Telecommunications Corporation, Revisions to Tariff F.C.C. No. 1, 76 FCC2d 33, 38 (Com. Car. Bur. 1980)).

217 *See, e.g.*, AT&T Comments at 86; Ad Hoc Comments at 29-30.

218 AT&T Reply Comments at 98 (*citing* Ad Hoc Comments at 29).

219 Du Pont is currently taking service under another Tariff 12 option.

220 Du Pont Comments at 5.

221 Sprint Comments at 49; MCI Comments at 29; MCC Comments at 32-35; CompTel Comments at 32; Williams Comments at 34; AmeriCall Comments at 18-19; One Call Reply Comments at 12-13.

222 MCC Comments at 32-33; Sprint Comments at 49.

223 Williams Comments at 34 (*citing Resale and Shared Use Order*, 83 FCC2d at 186; *Private Line Guidelines Order*, 97 FCC2d at 947).

224 Sprint Comments at 49; MCC Comments at 32-33; CompTel Comments at 32.

225 Sprint Comments at 49 & Reply Comments at 49.

226 CNSUG Comments at 37-38 (alleging that AT&T refuses to provide needed billing capabilities except at "exorbitant prices").

227 MCC Comments at 34.

228 MCI Reply Comments at 33.

229 MCI Comments at 29.

230 Sprint Reply Comments at 49-50.

231 *Id.* at 50. *See also* MCI Reply Comments at 33; MCC Reply Comments at 23-24; One Call Reply Comments at 12-13.

232 *Tariff 12 Order*, 4 FCC Rcd at 4938 & n. 69.

233 *Reconsideration Order*, 4 FCC Rcd at 7930.

85. After review of the record, we find that Options 1-4 contain no prohibitions, direct or indirect, relating to resale or shared use. In addition, Section 7.2.5 of the Tariff 12 general regulations, which applies to all Tariff 12 options, expressly grants any customer the right to resell or share all or part of each option.[234] Furthermore, as AT&T notes, any Tariff 12 customer who desires to resell can do so by disaggregating AT&T's Tariff 12 charges and allocating them to voice and data as it sees fit.[235] Accordingly, we find that Tariff 12 Options 1-4 contain no restrictions prohibiting or inhibiting resale or shared use.

86. Finally, commenters who argue that the Commission's policy on resale and shared use places an affirmative duty on AT&T to promote the resale or sharing of Tariff 12 options[236] misinterpret the *Resale and Shared Use Order*. Carriers are only prohibited from engaging in practices that prevent the resale or sharing of their offerings.[237] Therefore, claims that AT&T is not actively assisting resellers or sharing customers are irrelevant.

IV. CONCLUSION

87. The Commission has reviewed the tariff transmittals, the direct cases, the supporting materials, the pleadings, and the comments filed in this docket. We affirm that Tariff 12 is not "like" the individually tariffed services provided by AT&T on a disaggregated basis. In addition, we find that, on further analysis, and contrary to our prior decision, Tariff 12 integrated service packages need not be "like" each other for purposes of Section 202(a) of the Communications Act. We further conclude that Tariff 12 Options 1-4, in fact, are not "like" each other. Additionally, we conclude that Tariff 12 Options 1-4 satisfy the general availability requirement and comply with the Commission's policy prohibiting restrictions on resale and shared use. We also find that questions relating to compliance with the private line guidelines were improvidently designated and need not be reached. Accordingly, we conclude that the tariffs referenced herein do not violate Section 202(a) of the Communications Act and therefore we find them to be lawful.

V. ORDERING CLAUSES

88. Accordingly, IT IS ORDERED, pursuant to Sections 4(i), 4(j), 202(a), 204(a), and 205 of the Communications Act, 47 U.S.C. §§ 154(i), 154(j), 202(a), 204(a), 205, that the investigation of AT&T Communications, Tariff F.C.C. No. 12, Transmittal Nos. 1018, 1102, 1145, 1336, 1349, and 1409, IS TERMINATED, and the tariffs, as amended by Transmittal No. 1592, ARE LAWFUL.

89. IT IS FURTHER ORDERED that Williams' April 17, 1991, Motion to Accept Supplemental Comments IS DENIED.

90. IT IS FURTHER ORDERED that MCI's September 30, 1991, Motion to Supplement Record IS DENIED.

FEDERAL COMMUNICATIONS COMMISSION

Donna R. Searcy
Secretary

APPENDIX A[238]

COMMENTS FILED IN CC DOCKET NO. 87-568

Ad Hoc Telecommunications Users Committee and Other Specified Users (Asea Brown Boveri, Inc., Delta Air Lines, Inc., General Dynamics Corporation, United Technologies Corporation) (Ad Hoc)

Alexander & Alexander, Inc. (A&A)

AmeriCall Systems Of Louisville and First Phone Of New England, Inc. (AmeriCall)

American Petroleum Institute (API)

American Telephone and Telegraph Company (AT&T)

Boise Cascade Corporation (Boise)

CIGNA Systems (CIGNA)

Competitive Telecommunications Association (CompTel)

Cooper Industries, Inc. (Cooper)

Custom Network Services Users Group (CNSUG)

E.I. Du Pont de Nemours and Company (Du Pont)

EUA Shared VTNS Users Association (EUA)

Fidelity Investments (Fidelity)

General Electric Company (GE)

General Services Administration (GSA)

Hyatt Corporation (Hyatt)

Independent Data Communications Manufacturers Association, Inc. (IDCMA)

James River Corporation (James River)

Kemper Service Company (Kemper)

Marriott Corporation (Marriott)

McGraw-Hill, Inc. (McGraw-Hill)

MCI Telecommunications Corporation (MCI)

MidAmerican Communications Corporation (MCC)

Olin Corporation (Olin)

Primerica Corporation (Primerica)

SDN Users Association Inc. (SDNUA)

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[234] "VTNS is furnished for use by the Customer but may be used by others when so authorized by the Customer. VTNS may be resold or shared and the Customer may advise its user that a portion of its service is provided by AT&T." AT&T Tariff F.C.C. No. 12, Section 7.2.5, Use. And, as commenters have testified, Tariff 12 options are being resold today. *See* 80, *supra*.

[235] AT&T Comments at 85 (*citing AT&T Direct Case* at 25-35).

[236] *See* note 231, *supra*.

[237] *Resale and Shared Use Order*, 83 FCC 2d at 173, 185. In fact, the Commission has held that resellers or sharing customers have no right to force the underlying carrier to perform an individualized call accounting function to facilitate the billing of group members. *See* MCI Telecommunications Corp., 76 FCC 2d at 35; Telecomm Xpress, Inc. v. MCI, 2 FCC Rcd at 578.

[238] In this Appendix we list only formal and informal submissions filed in response to the *Remand Designation Order*.

Southwestern Bell Telephone Company (SWB)

Sycamore Consulting Group, Inc. (SCG)

USAir, Inc. (USAir)

US Sprint Communications Company Limited Partnership (Sprint)

US West Communications, Inc. (US West)

USX Corporation (USX)

Williams Telecommunications Group, Inc. (Williams)

REPLY COMMENTS FILED IN CC DOCKET NO. 87-568

Ad Hoc Telecommunications Users Committee and Other Specified Users (Asea Brown Boveri, Inc., Delta Air Lines, Inc., General Dynamics Corporation, United Technologies Corporation) (Ad Hoc)

AmeriCall Systems Of Louisville and

First Phone Of New England, Inc. (AmeriCall)

American Petroleum Institute (API)

American Telephone and Telegraph Company (AT&T)

Bethlehem Steel Corporation (Bethlehem)

Competitive Telecommunications Association (CompTel)

Consolidated Rail Corporation (Conrail)

Custom Network Services Users Group (CNSUG)

General Services Administration (GSA)

Independent Data Communications Manufacturers Association, Inc. (IDCMA)

MidAmerican Communications Corporation (MCC)

MCI Telecommunications Corporation (MCI)

One Call Communications, Inc. (One Call)

The Travelers Companies (Travelers)

Unisys Corporation (Unisys)

United Technologies Corp. (United)

US Sprint Communications Company Limited Partnership (Sprint)

Williams Telecommunications Group, Inc. (Williams)

INFORMAL SUBMISSIONS FILED IN CC DOCKET NO. 87-568

CompuServe Incorporated (CompuServe)

Computer Language Research (CLR)

FMC Corporation (FMC)

Motel 6., L.P. (Motel 6)

NCR Corporation (NCR)

J.C. Penney Company, Inc. (J.C. Penney)

Safeco Insurance Companies (Safeco)

Telecommunications Systems (TS)

Textron Inc. (Textron)

The Travelers Companies (Travelers)

Transamerica Telecommunications Corp. (Transamerica)

Voluntary Hospitals of America, Inc. (VHA)

Before the
Federal Communications Commission
Washington, D.C. 20554

PUBLIC NOTICE

Released: November 13, 1991

FEE DECISIONS OF THE MANAGING DIRECTOR AVAILABLE TO THE PUBLIC

The Managing Director is responsible for responding to requests for waiver or deferral of fees as well as other pleadings associated with the fee collection process. All responses to individuals are published in the FCC Record.

These decisions are available for public inspection. Each month, the Managing Director releases a Public Notice listing the decisions he has made on these matters. The decisions are placed in General Docket 86-285. A copy of the decision is also placed in the appropriate docket, if one exits.

The following Managing Director decisions are released for information:

Brown University (Uri Bar Zemer) - Request for refund of filing fee - **Granted** (June 13, 1991).

KMDX-FM 99, Inc. - Request for hearing fee refund for a FM station at Parker, Arizona - **Granted** (October 1, 1991).

Furniture City Broadcasters, Inc. - Request for hearing fee refund for a new FM station at Lenoir, North Carolina - **Denied** (October 3, 1991).

CDD Broadcasting - Request for hearing fee refund for a new FM station at Ocean City, Maryland - **Granted** (October 3, 1991).

Seeway Broadcasters - Request for Reinstatement for a modification to its license covering a low power TV station at Fremont, Ohio - **Granted** (October 8, 1991).

James C. Sliger - Request for hearing fee refund for a new FM station at Westwood, Kentucky - **Granted** (October 8, 1991).

Healdsburg Broadcasting, Inc. - Request for Reinstatement for a new FM station at Healdsburg, California - **Granted** (October 8, 1991).

Life Broadcasting, Inc. - Request for refund of hearing fee for station KTNT-FM, Edmond, Oklahoma - **Granted** (October 11, 1991).

Porter H. Davis - Request for refund of hearing fee for station KTNT-FM, Edmond Oklahoma - **Granted** (October 11, 1991).

Keith L. Miller, Jr. - Request for refund of hearing fee for a new FM radio station at Newport, Oregon - **Granted** (October 17, 1991).

Robert D. & Jenifer L. Weerts - Request for refund of hearing fee for a new FM station at Blue Earth, Minnesota - **Granted** (October 17, 1991).

Kramer Broadcasting, Inc. - Request for refund of filing fee for station WDDC(FM), Portage, Wisconsin - **Granted** (October 17, 1991).

Innovative Advertising Consultants, Inc. - Request for refund of rule making fee paid to modify the construction permit of Station WGUY(FM), Dexter, Maine - **Granted** (October 18, 1991).

PBR Communications Systems, Inc. - Request for refund or reduction of fee for station WPBR, Palm Beach Florida - **Partial Refund Granted** (October 18, 1991).

Profile Broadcasting Company, Inc. - Request for refund of hearing fee for a new FM Station at Lisbon, New Hampshire - **Granted** (October 18, 1991).

Mono County Service Area No. 1 - Request for refund of filing fee with five low power television and television translator stations and renewal of three television translator licenses - **Granted** (October 18, 1991).

NEC Technologies, Inc. - Request for refund of filing fee - **Granted** (October 18, 1991).

Lake Geneva Broadcasting, Inc. - Request for refund of hearing fee for a new FM radion station at Lake Geneva, Wisconsin - **Granted** (October 18, 1991).

B. F. Dillingham - Request for hearing fee refund for a new FM station at Hilo, Hawaii - **Granted** (October 21, 1991).

Lucille S. Bill - Request for refund of filing fee for a new FM radio station at Blue Earth, Minnesota - **Granted** (October 21, 1991).

Gregory J. & Carol W. Siefker - Request for refund of hearing fee for a new FM radio station at Ashley, Michigan - **Granted** (October 21, 1991).

Morgan County Industries - Request for refund of hearing fee for a new FM station at West Liberty, Kentucky - **Denied** (October 21, 1991).

John Norman & Donald Lesko - Request for "Petition to Defer Fee" for a new FM station at Chiefland, Florida - **Dismissed at Moot** (October 21, 1991).

Garrison City Broadcasting, Inc. - Request for refund of hearing fee for a new FM Station at Somersworth, New Hampshire - **Denied** (October 21, 1991).

Julie J. Carey - Request for refund of hearing fee for a new FM station at Nashville, Indiana - **Denied** (October 21, 1991).

Melinda Boucher Read - Request for refund of filing fee for a new FM station at Spokane, Washington - **Granted** (October 21, 1991).

White Construction Co. - Request for refund of a hearing fee for a new FM station at Chiefland, Florida - **Granted** (October 22, 1991).

ET Communications, Inc. - Request for refund of a hearing fee for a new FM station at Opelika, Alabama - **Granted** (October 28, 1991).

B & H Broadcasting Company - Request for refund of filing fee for a new FM station at Gosnell, Arkansas - **Denied** (October 28, 1991).

Caddo Broadcasting Company - Request for refund of a hearing fee for a new FM broadcast station at Hot Springs Village, Arkansas **Granted** (October 28, 1991).

Andrew Bongirno - Request for a refund of filing fee for a renewal of a Second Class Radio Telephone Operator License - **Denied** (October 28, 1991).

Katieco, Inc. - Request for refund of hearing fee for a new FM station at Ellettsville, Indiana - **Denied** (October 28, 1991).

Hurricane Island Outward Bound School - Request for adjustment of fee re radiotelephone requirements - **Denied** (October 28, 1991).

NOTE: ANY QUESTIONS REGARDING THIS REPORT SHOULD BE DIRECTED TO THE PREPARER, CLAUDETTE E. PRIDE, CHIEF, FEE SECTION ON (202) 632-0241.

FEDERAL COMMUNICATIONS COMMISSION

FEDERAL COMMUNICATIONS COMMISSION
Washington, D. C. 20554

OCT 18 1991

OFFICE OF
MANAGING DIRECTOR

Walter Steimel, Jr., Esquire
Bell, Boyd & Lloyd
1615 L Street, N.W.
Suite 1200
Washington, D.C. 20036-5601

Dear Mr. Steimel:

This is in reference to your request, filed on behalf of NEC Technologies, Inc. (NEC), for a refund of a fee that had been inadvertently submitted with its application for Part 15 authority which the Commission had previously granted. Due to this oversight, NEC's application will be withdrawn and its fee will be refunded.

A check, drawn in the amount of $735.00 and payable to NEC Technologies, Inc., will be forwarded to you at the earliest practicable time. If you have any questions concerning this refund, please contact the Chief, Fee Section at (202) 632-0241.

Sincerely,

Marilyn J. McDermett

Marilyn J. McDermett
Associate Managing Director
for Operations

FEDERAL COMMUNICATIONS COMMISSION
Washington, D. C. 20554

OFFICE OF
MANAGING DIRECTOR

OCT 22 1991

Captain Edward A. Dietrich
Waterfront Director
Hurricane Island Outward Bound School
P.O. Box 429
Rockland, Maine 04841

Dear Mr. Dietrich:

This is in response to your request for an adjustment of the fees required to cover Hurricane Island Outward Bound School's (Hurricane Island) applications for exemption from strict compliance with the Commission's radiotelephone requirements.

You state that Hurricane Island is a small nonprofit organization that conducts courses designed to enable participants to develop their personal resources. Hurricane Island employs 22 seagoing vessels in its program, each required to be equipped with radiotelephone facilities. In the past, Hurricane Island has obtained waivers from full compliance with the Commission's applicable radiotelephone requirements at no cost. However, under the Commission's rules implementing its fee program, a separate fee is now required for each individual exemption request. In your view, a separate fee payment for each vessel constitutes an onerous burden on Hurricane Island and will negatively affect its ability to serve the nation's youth. You request that the Commission impose only a single fee to cover the school's 22 waiver request since the vessels are identical.

We have withheld action on your request to await the Commission's consideration of whether to broaden the category of entities exempt from the fee requirement. See Establishment of a Fee Collection Program to Implement the Provisions of the Omnibus Reconciliation Act of 1989 (Fees II), 5 FCC Rcd 3558 (1990), Reconsidered in Part, FCC 91-298, released October 10, 1991. In its decision, the Commission specifically reaffirmed that, consistent with Congressional intent to grant waivers of the fee requirement narrowly, even not-for-profit youth organizations, such as Hurricane Island, requiring waivers of the rules pertaining to required radio equipment are subject to the fee requirement. Id. ¶¶55-56. Moreover, as directed by Congress, the

Commission declined to permit a blanket fee to substitute for the individual fees due from fleet operators. Id. ¶¶49-50. As a consequence, Hurricane Island is ineligible for a fee reduction.

Accordingly, your request is denied.

Sincerely,

Marilyn J. McDermett
Associate Managing Director
for Operations

FEDERAL COMMUNICATIONS COMMISSION
Washington, D. C. 20554

JUN 13 1991

OFFICE OF
MANAGING DIRECTOR

Mitchell Lazarus, Esquire
Arent Fox Kintner Plotkin & Kahn
1050 Connecticut Avenue, NW
Washington, D.C. 20036-5339

Dear Mr. Lazarus:

In connection with your request for refund of the proceeds of a check submitted by **Brown University** without an accompanying application, a check, payable to Brown University in the amount of $1525.00, will be forwarded to you at the earliest practicable time.

If you have any questions about this refund, please contact the Chief, Fee Section, at (202) 632-0211.

Sincerely,

Marilyn J. McDermett

Marilyn J. McDermett
Associate Managing Director
for Operations

FEDERAL COMMUNICATIONS COMMISSION
Washington, D. C. 20554

OCT 0 1 1991

OFFICE OF
MANAGING DIRECTOR

Peter Tannenwald, Esquire
Arent Fox Kintner Plotkin & Kahn
1050 Connecticut Avenue, N.W.
Washington, D.C. 20036-5339

Dear Mr. Tannenwald:

This is in response to your request for a refund of a hearing fee filed on behalf of KMDX-FM99, Inc. (KMDX), applicant for a renewal of its license for an FM station at Parker, Arizona.

Because a competing application for the facility had been accepted for filing, KMDX paid its hearing fee on July 15, 1991, but the sole competing applicant subsequently asked that its application be dismissed with prejudice. Thus, you argue that KMDX is no longer involved in a comparative proceeding, and it is entitled to a refund of its hearing fee.

In a recent decision, the Commission required the submission of hearing fees prior to the designation of applications for hearing. See Proposals to Reform the Commission's Comparative Hearing Process, 6 FCC Rcd 3403 (1991). There, the Commission stated that the hearing fee would be refunded if the application is granted without being designated for a comparative hearing. Id. Here, as a result of the dismissal of the sole competing applicant, the KMDX renewal is now a "singleton," and it is no longer subject to the Commission's comparative process. In such circumstances, we believe that a refund of the hearing fee is warranted.

Accordingly, your request for a refund is granted. A check in the amount of $6,760 will be mailed to KMDX-FM99, c/o Mr. Gilbert Leivas, 1312 14th Street, Parker, Arizona 85344 as soon as practicable.

Sincerely,

Marilyn J. McDermett
Associate Managing Director
for Operations

FEDERAL COMMUNICATIONS COMMISSION
Washington, D. C. 20554

OCT 0 3 1991

OFFICE OF
MANAGING DIRECTOR

R.L. Bush, Jr.
Furniture City Broadcasters, Inc.
Box 1080
309 Creekway Drive
Lenoir, N.C. 28645

Dear Mr. Bush:

This is in response to your request for refund of hearing fee submitted on behalf of **Furniture City Broadcasters, Inc.**, (Furniture City) an applicant for a new FM radio station at Lenoir, North Carolina. Furniture City paid its hearing fee with its Notice of Appearance. Subsequently, the applicant failed to make an exchange of documents as ordered by the presiding Administrative Law Judge, and as a consequence, Furniture City's application was dismissed with prejudice. See Memorandum Opinion and Order, FCC 91M-351, released January 30, 1991.

Section 1.1111(c) of the Commission's Rules provides for refund of a hearing fee only in cases where a Settlement Agreement is filed by the Notice of Appearance deadline or where only one applicant files a Notice of Appearance. See 47 C.F.R. § 1.1111(c). There is no provision for fee refund in cases such as Furniture City's where an application is dismissed by the presiding judge during the hearing process.

Accordingly, your request for fee refund on behalf of Furniture City Broadcasters, Inc. is denied.

Sincerely,

Marilyn J. McDermett

Marilyn J. McDermett
Associate Managing Director
for Operations

FEDERAL COMMUNICATIONS COMMISSION
Washington, D. C. 20554

OCT 0 3 1991

OFFICE OF
MANAGING DIRECTOR

Howard J. Braun, Esquire
Rosenman & Colin
1300 19th Street, N.W.
Suite 200
Washington, D.C. 20036

Dear Mr. Braun:

This is in response to your request on behalf of CDD Broadcasting Company (CDD), former applicant for a new FM station at Ocean City, Maryland, for a refund of its hearing fee.

You state the CDD submitted its fee on July 25, 1991, but subsequently withdrew its application prior to the issuance of a Hearing Designation Order (HDO) in the proceeding to select the licensee at Ocean City.

Our review of this matter discloses that the HDO had not been issued by the time CDD withdrew from the Ocean City proceeding. Pursuant to a recent Commission determination, an applicant is entitled to a refund of its hearing fee if the applicant withdraws its application before issuance of the HDO. See Proposals to Reform the Commission's Comparative Hearing Process, 6 FCC Rcd 3403, 3409 (1991). Accordingly, your request is granted.

A check, for $6,760.00, payable to CDD Broadcasting Company, will be forwarded to you at the earliest practicable time. If you have any questions about this matter, please call the Chief, Fee Section at (202) 632-0241.

Sincerely,

Marilyn J. McDermett

Marilyn J. McDermett
Associate Managing Director
for Operations

FEDERAL COMMUNICATIONS COMMISSION
Washington, D. C. 20554

OCT 0 8 1991

OFFICE OF
MANAGING DIRECTOR

Mr. Robert Ladd
Seeway Broadcasters, Inc.
201 W. Market Street
Sandusky, Ohio 44870

Dear Mr. Ladd:

This is in response to your request for reinstatement, nunc pro tunc, of an application filed by **LPTV Seeway Broadcasters, Inc.** (Seeway) for a modification to its license covering a low power TV station at Fremont, Ohio.

You state that Seeway's application was returned during a window period due to a typographical error in the fee code even though Seeway submitted the correct fee. In your view, a waiver of the filing deadline is in the public interest in order to make available to the public in a timely fashion the additional coverage that Seeway's application contemplates.

The Commission adopted the fee code requirement in order to streamline the efficiency of its fee processing and, thereby, speed the disposition of applications and other filings. See Establishment of a Fee Collection Program to Implement the Provisions of the Omnibus Budget Reconciliation Act of 1989, 5 FCC Rcd 3558, 3568-3570 (1990). We recognize that inadvertent errors in the entry of fee codes will occasionally occur and are, of course, concerned that the process remain as efficient as possible. However, we believe that errors involving fee code entry will be insufficient in volume to hamper the Fee Section in its fee processing function or the individual Bureaus in their efforts to dispose of applications in a timely fashion. Therefore, we conclude that a fee code error per se does not warrant the dismissal of an application and, accordingly, Seeway's application will be reinstated nunc pro tunc.

Our action here should in no way be construed as modifying the Commission's rule that applications submitted with a fee payment of less than the required amount will be returned. See 47 C.F.R. § 1.1114. Any application, including those submitted with an incorrect fee code, will be returned if the fee payment accompanying the application is insufficient.

Sincerely,

Marilyn J. McDermett

Marilyn J. McDermett
Associate Managing Director
for Operations

FEDERAL COMMUNICATIONS COMMISSION
Washington, D. C. 20554

OCT 0 8 1991

OFFICE OF
MANAGING DIRECTOR

James K. Edmundson, Esq.
Gardner, Carton & Douglas
1301 K Street, N.W.
Suite 900, East Tower
Washington, D.C. 20005

Dear Mr. Edmundson:

This is in response to your Request for Fee Refund submitted on behalf of **James C. Sliger (Sliger)**, applicant for a new FM radio station at Westwood, Kentucky.

Sliger tendered his hearing fee on July 15, 1991 pursuant to Proposals to Reform the Commission's Comparative Hearing Process to Expedite the Resolution of Cases, 6 FCC Rcd 157, recon. gtd. in part, 6 FCC Rcd 3403 (1991)(Comparative Hearing). The applicant then entered into a Settlement Agreement filed on July 31, 1991, which contemplated universal settlement of the Westwood proceeding and dismissal of Sliger's application. Accordingly, you now request that Sliger's hearing fee be refunded pursuant to Section 1.1111(c) of the Commission's Rules.

In the Comparative Hearing decision, the Commission stated that "refunds of the hearing fee paid prior to designation will be available to applicants that are dismissed, voluntarily or involuntarily, before an HDO is issued or granted without being designated for a comparative hearing." See 6 FCC Rcd at 158. This aspect of the decision was reiterated on reconsideration. See 6 FCC Rcd at 3403. Because Sliger participated in the Joint Petition for Approval of Settlement Agreement and Dismissal of Application, his application will be voluntarily dismissed upon approval, and his Request for Fee Refund therefore will be granted.

Accordingly, a check for $6,760, payable to James C. Sliger will be forwarded to P.O. Box 986, Athens, Tennessee, 37303 at the earliest practicable time. If you have any questions about this refund, please call Chief, Fee Section, at (202) 632-0241.

Sincerely,

Marilyn J. McDermett

Marilyn J. McDermett
Associate Managing Director
for Operations

FEDERAL COMMUNICATIONS COMMISSION
Washington, D. C. 20554

OCT 0 8 1991

OFFICE OF
MANAGING DIRECTOR

Peter A. Casciato, Esquire
Roundhouse Plaza
1500 Sansome Street
Suite 201
San Francisco, California 94111

Dear Mr. Casciato:

This is in response to your request for reinstatement, nunc pro tunc, of an application filed by Healdsburg Broadcasting, Inc. (Healdsburg) for new FM station at Healdsburg, California.

You state that the Healdsburg's application was returned for failure to designate the correct fee code on the Form 155 that you submitted with its hearing fee. The required hearing fee was submitted in full. You ask that Healdsburg's application be reinstated because the error was merely an inadvertent, typographical error and the requisite payment was paid in full.

The Commission adopted the fee code requirement in order to streamline the efficiency of its fee processing and, thereby, speed the disposition of applications and other filings. See Establishment of a Fee Collection Program to Implement the Provisions of the Omnibus Budget Reconciliation Act of 1989, 5 FCC Rcd 3558, 3568-3570 (1990). We recognize that inadvertent errors in the entry of fees code will occasionally occur and we are, of course, concerned that the fee collection process remain as efficient as possible. However, we believe that errors involving fee code entry will be insufficient in volume to hamper the Fee Section in its fee processing function or the individual Bureau's in their efforts to dispose of applications in a timely fashion. Therefore, we conclude that a fee code error per se does not warrant the dismissal of an application and, accordingly, Healdsburg's application will be reinstated nunc pro tunc.

Our action here should not be construed in any way as modifying the Commission's rule that applications submitted with a fee payment of less than the required amount will be returned. See 47 C.F.R. § 1.1114. Any application, including those submitted with an incorrect fee code, will be returned if the fee payment accompanying the application is insufficient.

Sincerely,

Marilyn J. McDermett
Associate Managing Director
for Operations

FEDERAL COMMUNICATIONS COMMISSION
Washington, D. C. 20554

OCT 11 1991

OFFICE OF
MANAGING DIRECTOR

J. Geoffrey Bentley, Esquire
Birch, Horton, Bittner and Cherot
1155 Connecticut Avenue, N.W.
Suite 1200
Washington, D.C. 20036

Dear Mr. Bentley:

This is in response to your requests for refunds of the hearing fee payments submitted in connection with the applications of Porter H. Davis, Receiver, and Life Broadcasting, Inc., proposed assignee for station KTNT-FM, Edmond, Oklahoma.

You state that refunds are due because the applicants entered a settlement agreement with the sole competing applicant which was approved by the Mass Media Bureau prior to the issuance of a Hearing Designation Order in this matter. Therefore, no hearing was required.

Our review of this matter discloses that the applicants paid their required hearing fees consistent with the procedures the Commission adopted in Proposals to Reform the Commission's Hearing Process, 6 FCC 3403 (1991). In that action, the Commission revised its procedures for hearing fee payments, but retained its rule that a hearing fee would be returned if a settlement agreement filed before or on the date for filing Notices of Appearance obviated the need for a hearing. See Id. at 3409; see also 47 C.F.R. § 1.1111(c). Accordingly, your requests for refund are granted.

We will forward to you two separate refund checks since the Commission's policy is to issue a refund check only to the payor of a fee payment. The first check, in the amount of $6,760.00 and representing a refund to Life Broadcasting, Inc., will be made out to Birch, Horton, Bittner and Cherot since your firm was the payor of the check covering Life's fee payment. The second check will be made payable to Life Broadcasting, Inc. since Life was the payor of the check covering Mr. Porter's fee payment. These checks will be sent to you at the earliest practicable time. If you have any questions concerning these refunds, please contact the Chief of the Fee Section at (202) 632-0241.

Sincerely,

Marilyn J. McDermett

Marilyn J. McDermett
Associate Managing Director
for Operations

FEDERAL COMMUNICATIONS COMMISSION
Washington, D. C. 20554

OCT 11 1991

OFFICE OF
MANAGING DIRECTOR

J. Geoffrey Bentley, Esquire
Birch, Horton, Bittner and Cherot
1155 Connecticut Avenue, N.W.
Suite 1200
Washington, D.C. 20036

Dear Mr. Bentley:

This is in response to your requests for refunds of the hearing fee payments submitted in connection with the applications of Porter H. Davis, Receiver, and Life Broadcasting, Inc., proposed assignee for station KTNT-FM, Edmond, Oklahoma.

You state that refunds are due because the applicants entered a settlement agreement with the sole competing applicant which was approved by the Mass Media Bureau prior to the issuance of a Hearing Designation Order in this matter. Therefore, no hearing was required.

Our review of this matter discloses that the applicants paid their required hearing fees consistent with the procedures the Commission adopted in Proposals to Reform the Commission's Hearing Process, 6 FCC 3403 (1991). In that action, the Commission revised its procedures for hearing fee payments, but retained its rule that a hearing fee would be returned if a settlement agreement filed before or on the date for filing Notices of Appearance obviated the need for a hearing. See Id. at 3409; see also 47 C.F.R. § 1.1111(c). Accordingly, your requests for refund are granted.

We will forward to you two separate refund checks since the Commission's policy is to issue a refund check only to the payor of a fee payment. The first check, in the amount of $6,760.00 and representing a refund to Life Broadcasting, Inc., will be made out to Birch, Horton, Bittner and Cherot since your firm was the payor of the check covering Life's fee payment. The second check will be made payable to Life Broadcasting, Inc. since Life was the payor of the check covering Mr. Porter's fee payment. These checks will be sent to you at the earliest practicable time. If you have any questions concerning these refunds, please contact the Chief of the Fee Section at (202) 632-0241.

Sincerely,

Marilyn J. McDermett

Marilyn J. McDermett
Associate Managing Director
for Operations

FEDERAL COMMUNICATIONS COMMISSION
Washington, D. C. 20554
OCT 17 1991

OFFICE OF
MANAGING DIRECTOR

Richard J. Hayes, Jr., Esq.
1359 Black Meadow Road
Greenwood Plantation
Spotsylvania, Virginia 22553

Dear Mr. Hayes:

This is in response to your request for refund of the hearing fee submitted on behalf of **Keith L. Miller, Jr.** (Miller), applicant for a new FM radio station at Newport, Oregon.

Miller tendered his hearing fee on July 17, 1991 pursuant payment rules established in Proposals to Reform the Commission's Comparative Hearing Process to Expedite the Resolution of Cases, 6 FCC Rcd 157, recon. gtd. in part, 6 FCC Rcd 3403 (1991) (Comparative Hearing). Prior to the designation of the mutually exclusive applicants for a comparative hearing, Miller entered into a universal settlement agreement and requested that his application be dismissed.

In the Comparative Hearing decision, the Commission required that hearing fees be paid prior to designation of comparative applicant for hearing, but it noted that "refunds of the hearing fee paid prior to designation will be available to applicants that are dismissed, voluntarily or involuntarily, before an HDO is issued or granted without being designated for a comparative hearing." See 6 FCC Rcd at 158. This aspect of the decision was reiterated on reconsideration. See 6 FCC Rcd at 3403. Thus, your request will be granted.

Accordingly, a check for $6,760, payable to Keith L. Miller, Jr., will be forwarded to 13809 Black Meadow Road, Spotsylvania, Virginia, 22553, at the earliest practicable time. If you have any questions about this refund, please call Chief, Fee Section, at (202) 632-0241.

Sincerely,

Marilyn J. McDermett

Marilyn J. McDermett
Associate Managing Director
for Operations

FEDERAL COMMUNICATIONS COMMISSION
Washington, D. C. 20554

OCT 17 1991

OFFICE OF
MANAGING DIRECTOR

Barbara L. Waite, Esquire
Venable, Baetjer, Howard & Civiletti
1201 New York Avenue, N.W.
Suite 1000
Washington, D.C. 20005-3917

Dear Ms. Waite:

This is in response to your request for a refund of the hearing fee submitted by Robert D. and Jenifer L. Weerts, applicants for a new FM station at Blue Earth, Minnesota.

Pursuant to the procedure adopted in Proposals to Reform the Commission's Hearing Process, 6 FCC Rcd 3403, 3409 (1991), Mr. and Ms. Weerts paid their hearing fee by July 15, 1991. Subsequently, but prior to the release of a Hearing Designation Order (HDO) concerning the Blue Earth station, Mr. and Ms. Weerts entered into a settlement agreement with other applicants for the station and requested the dismissal of their application.

Prior to the Commission's decision in Proposals to Reform the Commission's Hearing Process, applicants that elected to withdraw from the application process on or before the Notice of Appearance deadline were not obligated to file a hearing fee. We do not believe that Proposals to Reform the Commission's Hearing Process was intended to modify an applicant's ability to withdraw, on or before the Notice of Appearance deadline, without the loss of the hearing fee.

Accordingly, your request is granted. A refund, in the amount of $6,760.00, made payable to Robert D. and Jenifer L. Weerts, will be forwarded to you at the earliest practicable time. If you have any questions about this matter, please call the Chief, Fee Section at (202) 632-0241.

Sincerely,

Marilyn J. McDermett

Marilyn J. McDermett
Associate Managing Director
for Operations

FEDERAL COMMUNICATIONS COMMISSION
Washington, D. C. 20554

OCT 17 1991

OFFICE OF
MANAGING DIRECTOR

Mr. Ed Kramer
President
Kramer Broadcasting, Inc.
Highway 51 South
Post Office Box 300
Portage, Wisconsin 53901

Dear Mr. Kramer:

This is in response to your request for a refund of the fee that Kramer Broadcasting, Inc., licensee of station WDDC(FM), Portage, Wisconsin, submitted with its application for an antenna site change.

You state that Kramer Broadcasting recently found a mistake in the description of its station's antenna tower coordinates which had been filed with the Commission by a previous owner. The sole purpose of your application was to correct the location of the tower now reflected in the Commission's files. No physical relocation of the tower was contemplated.

We have determined that the public interest in the precise description of the location of an antenna tower outweighs the processing costs that the Commission incurs to correct such errors. See letter by Edward J. Minkel, Managing Director to Richard Hildreth, dated January 17, 1989. We find that a grant of your request is warranted where the only change you have indicated is the correction of the erroneous tower location data previously on file.

Accordingly, your request is granted. #565

Sincerely,

Marilyn J. McDermett

Marilyn J. McDermett
Associate Managing Director
for Operations

FEDERAL COMMUNICATIONS COMMISSION
Washington, D. C. 20554

OCT 18 1991

OFFICE OF
MANAGING DIRECTOR

Patricia A. Mahoney, Esquire
Fletcher, Heald & Hildreth
1225 Connecticut Avenue, N.W.
Suite 400
Washington, D.C. 20036-2679

Dear Ms. Mahoney:

This is in response to your request, filed on behalf of Innovative Advertising Consultants, Inc. (IAC), for a refund of a rule making fee IAC paid in conjunction with an application to modify the construction permit of Station WGUY(FM), Dexter, Maine.

On January 22, 1990, IAC filed a petition for rule making to upgrade WGUY's channel from a class A to a class C2. The Notice of Proposed Rule Making soliciting comments on that change was released October 17, 1990, 5 FCC Rcd 5942, and the Report and Order substituting Channel 271C2 for Channel 271A at Dexter, Maine was released on January 31, 1991. 6 FCC Rcd 591. IAC filed an application to modify WGUY's construction permit to specify operation on Channel 271C2 on June 12, 1991. That application was accompanied by a rule making fee payment in the amount of $1,565.00. IAC seeks a refund of that payment because its petition for rule making was filed before the effective date of the rules implementing the rule making fee.

The rule making fee was part of a package of new and revised filing fees contained in the Omnibus Budget Reconciliation Act of 1989 (1989 Budget Act), Pub. L. No. 101-239, 101 Stat. 2106, codified at 47 U.S.C. § 158 (1989), signed into law on December 19, 1989. Effective May 21, 1990, the Commission adopted rule changes to implement the 1989 Budget Act. In the Matter of Establishment of a Fee Collection Program to Implement the Provisions of the Omnibus Budget Reconciliation Act of 1989, 5 FCC Rcd 3558 (1989) (Fees II). The Commission therein determined that the new rule making fee would be payable after the conclusion of the rule making proceeding, upon application for the new higher class of channel. 5 FCC Rcd at 3659-60.

We have determined that the fee requirement should apply to all cases in which a petition for rule making was filed after the effective date of the Commission's implementation of the 1989 Budget Act's requirements (May 21, 1990). As of that date, potential

petitioners were clearly on notice that rule making requests to upgrade an FM station's channel or change the community of license for an FM or TV station were subject to fees.

Accordingly, because IAC's petition for rule making was filed before the adoption of Fees II, your request is granted. A check, in the amount of $1,565.00 and made payable to Innovative Advertising Consultants, Inc., will be forwarded to you at the earliest practicable time. If you have any questions concerning this refund, please contact the Chief, Fee Section at (202) 632-0241.

Sincerely,

Marilyn J. McDermett

Marilyn J. McDermett
Associate Managing Director
for Operations

FEDERAL COMMUNICATIONS COMMISSION
Washington, D. C. 20554

OCT 18 1991

OFFICE OF
MANAGING DIRECTOR

David M. Hunsaker, Esquire
Putbrese, Hunsaker & Ruddy
McLean House, Suite 100
P.O. Box 539
McLean, Virginia 22101

Dear Mr. Hunsaker:

This is in response to your request for a refund, or reduction, of the fee that you submitted on behalf of PBR Communications Systems, Inc. (PBR), licensee of station WPBR, Palm Beach, Florida, to cover its application for a major modification of its licensed facilities.

Initially, PBR's application requested a minor change, and it was submitted with the appropriate fee for such requests. However, the Mass Media Bureau informed PBR that it could not grant the application because the proposed facilities would not place a city grade signal over PBR's city of license. Thus, it was suggested that PBR consider filing for a new community of license. Subsequently, PBR amended its request, specifying Lantana as its community of license. As a request for a new community of license is a major change, PBR paid the requisite fee for its applications. You argue that the payment of the second and larger major change fee is unwarranted because the amended request included no substantive change to PBR's earlier technical proposal.

We believe that the proper handling of this situation is to treat PBR's request for a new city of license as an amendment to its original minor change application. As such, the amendment resulted in a change of status of that application from one requesting a minor change to one requesting a major change, and under section 1.1107(e), PBR should have been billed for $1,690 (the difference between the minor change fee of $565 and the major change fee of $2,255). Rather, PBR paid a total of $2,8205 ($2,255 plus $565). Thus, the applicant is due a refund of $565.

Accordingly, your request for a refund is granted to the extent indicated above. A check, drawn in the amount of $565.00 and payable to PBR Communications Systems, Inc., will be forwarded to you at the earliest practicable time. If you have any questions contact the Chief, Fee Section at (202) 632-0241.

Sincerely,

Marilyn J. McDermett

Marilyn J. McDermett
Associate Managing Director
for Operations

FEDERAL COMMUNICATIONS COMMISSION
Washington, D. C. 20554

OCT 18 1991

OFFICE OF
MANAGING DIRECTOR

Ms. Judith F. Aydelott
Vice President and Treasurer
Profile Broadcasting Company, Inc.
20 Main Street
Littleton, New Hampshire 03561

Dear Ms. Aydelott:

This is in response to your request for a refund of the hearing fee submitted by Profile Broadcasting Company, Co. (Profile), the successful applicant for a new FM station at Lisbon, New Hampshire.

You state that Profile entered a settlement agreement with the three competing applicants for the station at Lisbon which provided that Profile would be the surviving applicant. The settlement was timely filed, and approved by the presiding Administrative Law Judge, but Profile's hearing fee was retained since its application was not immediately grantable due to an outstanding directive.

We withheld action in this matter to await the Commission's consideration of whether to permit the refund of a hearing fee in circumstances in which the the sole surviving applicant must resolve an outstanding issue or directive. See Establishme. . of a Fee Collection Program to Implement the Provisions of the Omnibus Budget Act of 1989 (Fees II), 5 FCC Rcd 3558 (1990), Reconsidered in Part, FCC 91-298, released October 10, 1991. Therein, the Commission concluded that it would not require the hearing fee where the sole surviving applicant was only required to satisfy a directive (as opposed to an issue) specified in the designation order. See Id. ¶48.

Accordingly, your request for a refund is granted.

Sincerely,

Marilyn J. McDermett

Marilyn J. McDermett
Associate Managing Director
for Operations

FEDERAL COMMUNICATIONS COMMISSION
Washington, D. C. 20554

OCT 18 1991

OFFICE OF
MANAGING DIRECTOR

Howard A. Topel, Esquire
Mullin, Rhyne, Emmons and Topel
1000 Connecticut Avenue, N.W.
Suite 500
Washington, D.C. 20036-5383

Dear Mr. Topel:

This is in response to your request for a refund of fee payments submitted to cover applications filed by Mono County Service Area No. 1 (MCSA) in connection with five low power television and television translator stations and the renewal of three television translator licenses.

You state that MCSA submitted the fees with its applications in order to avoid any delay in their acceptance and processing, but as a governmental entity, it is nevertheless exempt from the fee requirement. In support, you state that MCSA is an entity formed, funded and controlled by the County of Mono, California, charged with bringing television programming to local residents who otherwise may have no access to such programming.

In view of the foregoing, we are satisfied that MCSA is a governmental entity within the meaning of section 1.1112(f) of the Commission's rules and, therefore, is entitled to a refund of the subject filing fees.

Accordingly, your request is granted. A check, drawn in the amount of $2,230.00 and payable to Mono County service Area No. 1, will be forwarded to you at the earliest practicable time. If you have any questions concerning this refund, please contact the Chief, Fee Section at (202) 632-0241.

Sincerely,

Marilyn J. McDermett

Marilyn J. McDermett
Associate Managing Director
for Operations

FEDERAL COMMUNICATIONS COMMISSION
Washington, D. C. 20554

OFFICE OF
MANAGING DIRECTOR

OCT 18 1991

Matthew H. McCormick, Esq.
Reddy, Begley & Martin
2033 M Street, N.W.
Washington, D.C. 20036

Dear Mr. McCormick:

This is in response to your "Hearing Fee Refund Request" submitted on behalf of Lake Geneva Broadcasting, Inc. (LGB), applicant for a new FM radio station at Lake Geneva, Wisconsin.

LGB tendered its hearing fee on July 15, 1991 pursuant to Proposals to Reform the Commission's Comparative Hearing Process to Expedite the Resolution of Cases, 6 FCC Rcd 157, recon. gtd. in part, 6 FCC Rcd 3403 (1991)(Comparative Hearing). You state that the applicant decided against filing a Notice of Appearance in the proceeding and requests that LGB's hearing fee be refunded.

In the Comparative Hearing decision, the Commission stated that "refunds of the hearing fee paid prior to designation will be available to applicants that are dismissed, voluntarily or involuntarily, before an HDO is issued or granted without being designated for a comparative hearing." See 6 FCC Rcd at 158. Although the HDO was issued in this proceeding (see MM Docket No. 91-205, DA 91-833), the Comparative Hearing decision amended Section 1.1111(c) of the Commission's Rules to allow for refund of the hearing fee in cases where the applicant fails to file a Notice af Appearance. See 6 FCC Rcd at 169. Therefore, LGB's "Hearing Fee Refund Request" will be granted.

Accordingly, a check for $6,760, payable to Lake Geneva Broadcasting, Inc., will be forwarded to you at the earliest practicable time. If you have any questions about this refund, please call Chief, Fee Section, at (202) 632-0241.

Sincerely,

Marilyn J. McDermett

Marilyn J. McDermett
Associate Managing Director
for Operations

FEDERAL COMMUNICATIONS COMMISSION
Washington, D. C. 20554

OFFICE OF
MANAGING DIRECTOR

OCT 21 1991

Leonard S. Joyce, Esq.
Blair, Joyce & Silva
1825 K Street, N.W.
Washington, D.C. 20006

Dear Mr. Joyce:

This is in response to your "Request for Hearing Fee Refund" submitted on behalf of **Morgan County Industries** (Morgan County), applicant for a new FM station at West Liberty, Kentucky.

You state that Morgan County and a competing applicant filed a Settlement Agreement by the Notice of Appearance deadline, which resulted in grant of Morgan County's application. However, the Hearing Designation Order in this case specified an air hazard issue against Morgan County's application (see DA 91-293, released March 4, 1991). The presiding judge resolved this matter by summary decision rather than by deletion (see FCC 91M-1330, released April 17, 1991). You argue that, given the fact that this proceeding was resolved soon after designation and without the need for a hearing, Morgan County is entitled to a refund of its hearing fee.

In a recent action, the Commission specifically addressed the resolution of a comparative broadcast proceeding where an air hazard issue alone precluded grant of an application. Although this could be resolved by submission of a determination of no air hazard from the Federal Aviation Administration, the Commission decided that retention of the hearing fee is appropriate in such cases. See Establishment of a Fee Collection Program to Implement the Provisions of the Omnibus Budget Reconciliation Act of 1989, (Fees II Reconsideration), paras. 46 and 47, FCC 91-298, released October 10, 1991.

Since the designation order specified an air hazard issue against Morgan County's application that was resolved by summary decision rather than by deletion, the hearing fee will be retained. Accordingly, your request for a refund is denied.

Sincerely,

Marilyn J. McDermett

Marilyn J. McDermett
Associate Managing Director
for Operations

FEDERAL COMMUNICATIONS COMMISSION
Washington, D. C. 20554

OFFICE OF
MANAGING DIRECTOR

OCT 21 1991

James K. Edmundson, Esq.
Gardner, Carton & Douglas
1301 K Street, N.W.
Suite 900, East Tower
Washington, D.C. 20005

Dear Mr. Edmundson:

This is in response to your "Request for Fee Refund" submitted on behalf of Lucille S. Bill (Bill), applicant for a new FM radio station at Blue Earth, Minnesota.

Bill tendered her hearing fee on July 15, 1991 pursuant to Proposals to Reform the Commission's Comparative Hearing Process to Expedite the Resolution of Cases, 6 FCC Rcd 157, recon. gtd. in part, 6 FCC Rcd 3403 (1991)(Comparative Hearing). The applicant then entered into a Settlement Agreement filed on July 30, 1991, which contemplated universal settlement of the Blue Earth proceeding and dismissal of Bill's application. Accordingly, you now request that Bill's hearing fee be refunded pursuant to Section 1.1111(c) of the Commission's Rules.

In the Comparative Hearing decision, the Commission stated that "refunds of the hearing fee paid prior to designation will be available to applicants that are dismissed, voluntarily or involuntarily, before an HDO is issued or granted without being designated for a comparative hearing." See 6 FCC Rcd at 158. This aspect of the decision was reiterated on reconsideration. See 6 FCC Rcd at 3403. Because Bill participated in the Joint Petition for Approval of Settlement Agreement and Dismissal of Application, her application will be voluntarily dismissed upon approval, and her "Request for Fee Refund" therefore will be granted.

Accordingly, a check for $6,760, payable to Lucille S. Bill, will be forwarded to you at the earliest practicable time. If you have any questions about this refund, please call Chief, Fee Section, at (202) 632-0241.

Sincerely,

Marilyn J. McDermett

Marilyn J. McDermett
Associate Managing Director
for Operations

FEDERAL COMMUNICATIONS COMMISSION
Washington, D. C. 20554

10/24/91

OFFICE OF
MANAGING DIRECTOR

J. Geoffrey Bentley, Esq.
Birch, Horton, Bittner and Cherot
1155 Connecticut Avenue, N.W.
Suite 1200
Washington, D.C. 20036

Dear Mr. Bentley

This is in response to your "Fee Refund Request" submitted on behalf of **Gregory J. and Carol W. Siefker** (the Siefkers), applicants for a new FM radio station at Ashley, Michigan.

The Siefkers tendered their hearing fee on July 15, 1991 pursuant to Proposals to Reform the Commission's Comparative Hearing Process to Expedite the Resolution of Cases, 6 FCC Rcd 157, recon. gtd. in part, 6 FCC Rcd 3403 (1991)(Comparative Hearing). You state that the application was returned as defective on July 30, 1991, and a hearing designation order was never issued. Accordingly, you now request that the Siefkers' hearing fee be refunded pursuant to the Commission's Comparative Hearing decision.

In the Comparative Hearing decision, the Commission stated that "refunds of the hearing fee paid prior to designation will be available to applicants that are dismissed, voluntarily or involuntarily, before an HDO is issued or granted without being designated for a comparative hearing." See 6 FCC Rcd at 158. This aspect of the decision was reiterated on reconsideration. See 6 FCC Rcd at 3403. Because the Siefkers' application was dismissed prior to the hearing designation order, their "Fee Refund Request" will be granted.

Accordingly, a check for $6,760, payable to Gregory J. and Carol W. Siefker, will be forwarded to P.O. Box 1, St. Louis, Michigan, 48880 at the earliest practicable time. If you have any questions about this refund, please call Chief, Fee Section, at (202) 632-0241.

Sincerely,

Marilyn J. McDermett
Associate Managing Director
for Operations

FEDERAL COMMUNICATIONS COMMISSION
Washington, D. C. 20554
10/21/91

OFFICE OF
MANAGING DIRECTOR

John E. Fiorini, Esq.
Gardner, Carton & Douglas
1301 K Street, N.W.
Suite 900, East Tower
Washington, D.C. 20005

Dear Mr. Fiorini:

This is in response to your "Request for Refund of Hearing Fee" submitted on behalf of the B.F. Dillingham Company (Dillingham), applicant for a new FM radio station at Hilo, Hawaii.

Dillingham tendered his hearing fee on July 15, 1991 pursuant to Proposals to Reform the Commission's Comparative Hearing Process to Expedite the Resolution of Cases, 6 FCC Rcd 157, recon. gtd. in part, 6 FCC Rcd 3403 (1991)(Comparative Hearing). The applicant then entered into a Settlement Agreement filed on July 31, 1991, which contemplated universal settlement of the Hilo proceeding and dismissal of Dillingham's application. Accordingly, you now request that Dillingham's hearing fee be refunded pursuant to Section 1.1111(c) of the Commission's Rules.

In the Comparative Hearing decision, the Commission stated that "refunds of the hearing fee paid prior to designation will be available to applicants that are dismissed, voluntarily or involuntarily, before an HDO is issued or granted without being designated for a comparative hearing." See 6 FCC Rcd at 158. This aspect of the decision was reiterated on reconsideration. See 6 FCC Rcd at 3403. Because Dillingham participated in the Joint Petition for Approval of Settlement Agreement and its application will be voluntarily dismissed upon approval, Dillingham's "Request for Refund of Hearing Fee" will be granted.

Accordingly, a check for $6,760, payable to the B.F. Dillingham Company, will be forwarded to P.O. Box 3436, Honolulu, Hawaii, 96801, at the earliest practicable time. If you have any questions about this refund, please call Chief, Fee Section, at (202) 632-0241.

Sincerely,

Marilyn J. McDermett

Marilyn J. McDermett
Associate Managing Director
for Operations

FEDERAL COMMUNICATIONS COMMISSION
Washington, D. C. 20554

OFFICE OF
MANAGING DIRECTOR

OCT 28 1991

Mr. Andrew Bongirno
6803 Boulevard East
Guttenberg, New Jersey 07093

Dear Mr. Bongirno:

This is in response to your request for a refund of the $35.00 fee paid with your application for a renewal of your Second Class Radio Telephone Operator License.

Your application was dismissed because the five year grace period for renewal of a Radio Telephone Operator License had elapsed. You argue that a refund is appropriate because retaining your fee while dismissing your application is "equivalent to a company not refunding my deposit for something I ordered because the merchandise was no longer available and my deposit was their fee to research the matter."

The application fees charged by the Federal Communications Commission are intended to reflect the average cost of processing an application subject to the fees. Unlike your analogy to a merchant, payment of these fees in no way assures or even implies that an application will be granted. Rather, the fee is paid to cover the costs of considering the application. In this regard, the Commission has stated that, once an application has cleared the fee review process, the subsequent rejection of the underlying application for any reason will not result in a refund of the fee. See 47 C.F.R. § 1.1111; Establishment of a Fee Collection Program to Implement the Provisions of the Omnibus Budget Reconciliation Act of 1985, 2 FCC Rcd 947, 949 (1987).

Accordingly, your request for a fee refund is denied.

Sincerely,

Marilyn J. McDermett

Marilyn J. McDermett
Associate Managing Director
for Operations

FEDERAL COMMUNICATIONS COMMISSION
Washington, D. C. 20554

OFFICE OF
MANAGING DIRECTOR

OCT 28 1991

Lee J. Peltzman, Esquire
Baraff, Koerner, Olender
& Hochberg, P.C.
2033 M Street, N.W.
Suite 700
Washington, D.C. 20036

Dear Mr. Peltzman:

This is in response to your request for a refund of the hearing fee submitted by Katieco, Inc. (Katieco), the surviving applicant for a new FM station at Ellettsville, Indiana.

Katieco and three competing applicants were designated for a comparative hearing to select the licensee at Ellettsville. See Hearing Designation Order (HDO), MM Docket No. 90-255, released June 4, 1990. The HDO included an air hazard issue against Katieco. Katieco filed a timely request for approval of a settlement agreement among all four applicants with its Notice of Appearance and fee payment. Subsequently, Katieco filed a No Hazard Determination issued by the Federal Aviation Administration (FAA) and a Motion for Summary Decision of the air hazard issue. The presiding Administrative Law Judge (ALJ) approved the settlement agreement, granted Katieco's Motion on the air hazard issue and, consequently, granted Katieco the FM license.

You argue that Katieco's fee payment should be returned because Katieco timely filed with the FAA a request for clearance of its proposed antenna site on September 27, 1989, approximately seven months before the Mass Media Bureau released the HDO in this proceeding. Moreover, you state that the FAA had previously issued a No Hazard Determination to Katieco approving the specified location and the exact technical parameters described in Katieco's request. However, notwithstanding Katieco's timely request and the efforts of the Antenna Survey Branch to obtain the FAA clearance, the FAA did not approve the site until July 10, 1990, more than two months after issuance of the HDO. In sum, Katieco argues that it would be unfair for the Commission to retain Katieco's hearing fee when the fee would not have been due absent the protracted review by the FAA of its proposed antenna site.

We withheld action in this matter to await the Commission's consideration of whether to permit the refund of a hearing fee in circumstances in which the sole surviving applicant must resolve an outstanding air hazard issue. See Establishment of a Fee Collection Program to Implement the Provisions of the Omnibus Budget Reconciliation Act of 1989 (Fees II), 5 FCC Rcd 3558 (1990), reconsidered in part, FCC 91-298, released October 10, 1991. Therein, the Commission decided to retain the fee requirement whenever an air hazard issue is resolved on the merits. Id. at ¶¶46-48. In the instant case, there is no dispute that the ALJ adjudicated the merits of the air hazard issue. The fact that Katieco's air hazard clearance was not forthcoming from the FAA before the Bureau issued the HDO is outside the purview of the Commission. Any concern that Katieco may have concerning the timing of the FAA's action should be brought to the attention of the FAA.

Accordingly, your request is denied.

Sincerely,

Marilyn J. McDermett
Associate Managing Director
for Operations

FEDERAL COMMUNICATIONS COMMISSION
Washington, D. C. 20554

OFFICE OF
MANAGING DIRECTOR

OCT 21 1991

Joseph A. Belisle, Esquire
Leibowitz & Spencer
One S.E. Third Avenue
Suite 1450
Miami, Florida 33131-1710

Dear Mr. Belisle:

This is in response to your request for a "Petition to Defer Fee" submitted on behalf of the partnership of John Norman and Donald Lesko (Norman), applicants for a new FM station at Chiefland, Florida.

You request deferral of the hearing fee in this case pending approval of a settlement agreement by the presiding Administrative Law Judge. By Memorandum Opinion and Order, FCC 91M-946, released March 14, 1991, the settlement agreement was granted, resulting in dismissal of the application of John Norman and Donald Lesko.

Accordingly, your petition is rendered moot.

Sincerely,

Marilyn J. McDermett

Marilyn J. McDermett
Associate Managing Director
for Operations

FEDERAL COMMUNICATIONS COMMISSION
Washington, D. C. 20554

OFFICE OF
MANAGING DIRECTOR

OCT 21 1991

John E. Fiorini, Esq.
Gardner, Carton & Douglas
1301 K Street, N.W.
Suite 900, East Tower
Washington, D.C. 20005

Dear Mr. Fiorini:

This is in response to your "Petition for Refund of Hearing Fee" submitted on behalf of **Garrison City Broadcasting, Inc.** (Garrison City), applicant for a new FM station at Somersworth, New Hampshire.

You state that the Hearing Designation Order in this case (DA 90-70, released February 14, 1990) specified an air hazard issue against Garrison City's application, which was later resolved by summary decision by the presiding judge (see FCC 90M-1325, released May 24, 1990). You further state that in this same Order the ALJ granted the Joint Request for Approval of Agreement, resulting in the grant of Garrison City's application. You therefore request refund of Garrison City's hearing fee, arguing that the judge's resolution of the air hazard issue by summary decision rather than by deletion did not warrant retention of the hearing fee.

In a recent action, the Commission specifically addressed the resolution of a comparative broadcast proceeding where an air hazard issue alone precluded grant of an application. Although this could be resolved by submission of a determination of no air hazard from the Federal Aviation Administration, the Commission decided that retention of the hearing fee is appropriate in such cases. See Establishment of a Fee Collection Program to Implement the Provisions of the Omnibus Budget Reconciliation Act of 1989, (Fees II Reconsideration), paras. 46 and 47, FCC 91-298, released October 10, 1991.

Since the designation order specified an air hazard issue against Garrison City's application that was resolved by summary decision rather than by deletion, the hearing fee will be retained. Accordingly, your request for a refund is denied.

Sincerely,

Marilyn J. McDermett
Associate Managing Director
for Operations

FEDERAL COMMUNICATIONS COMMISSION
Washington, D. C. 20554

OFFICE OF
MANAGING DIRECTOR

OCT 21 1991

Robert A. DePont, Esq.
P.O. Box 386
Annapolis, MD 21404

Dear Mr. DePont:

This is in response to your "Request for Fee Refund" submitted on behalf of Julie J. Carey (Carey), applicant for a new FM station at Nashville, Indiana.

You state that the Hearing Designation Order in this case (DA 91-204, released March 4, 1991) specified an air hazard issue against Carey's application, which was later resolved in Carey's favor in a Memorandum Opinion and Order issued by the presiding judge (see FCC 91M-1141, released March 29, 1991). You further state that the ALJ granted the Joint Request for Approval of Settlement, resulting in the grant of Carey's application (see FCC 91M-1142, released March 29, 1991). You therefore request refund of Carey's hearing fee, stating that the judge's resolution of the air hazard issue by summary decision rather than by deletion did not warrant retention of her hearing fee.

In a recent action, the Commission specifically addressed the resolution of a comparative broadcast proceeding where an air hazard issue alone precluded grant of an application. Although this could be resolved by submission of a determination of no air hazard from the Federal Aviation Administration, the Commission decided that retention of the hearing fee is appropriate in such cases. See Establishment of a Fee Collection Program to Implement the Provisions of the Omnibus Budget Reconciliation Act of 1989, (Fees II Reconsideration), paras. 46 and 47, FCC 91-298, released October 10, 1991.

Since the designation order specified an air hazard issue against Carey's application that was resolved by summary decision rather than by deletion, the hearing fee will be retained. Accordingly, your request for a refund is denied.

Sincerely,

Marilyn J. McDermett
Associate Managing Director
for Operations

FEDERAL COMMUNICATIONS COMMISSION
Washington, D. C. 20554

OFFICE OF
MANAGING DIRECTOR

OCT 21 1991

Ellen S. Mandell, Esq.
Pepper and Corazzini
200 Montgomery Building
1776 K Street, N.W.
Washington, D.C. 20006

Dear Ms. Mandell:

This is in response to your request for "Request for Refund of Filing Fee" submitted on behalf of **Melinda Boucher Read**, applicant for a new FM station at Spokane, Washington.

You state that Melinda Boucher Read was the only applicant that filed a Notice of Appearance and paid a hearing fee in this proceeding. However, the Hearing Designation Order requested a ministerial amendment to Melinda Boucher Read's application (see DA 90-1927, released January 30, 1991, at paragraphs 7 and 16). Her amendment was accepted by Memorandum Opinion and Order, FCC 91M-861, released March 6, 1991. The proceeding itself was later settled, resulting in grant of Melinda Boucher Read's application (see FCC 91M-862, released March 6, 1991). You request refund of Boucher Read's hearing fee pursuant to section 1.1111(c)(2) of the Commission's rules.

Although the Hearing Designation Order did not specify any issues against Melinda Boucher Read's application, the supplementary information required by paragraphs 7 and 16 meant that the application was not "immediately grantable" (see 47 C.F.R. §1.1111(c)(2)), thereby precluding refund of the hearing fee. However, the Commission recently decided that retention of the hearing fee "whenever the sole surviving applicant had to satisfy a directive specified in the designation order is no longer warranted." See Establishment of a Fee Collection Program to Implement the Provisions of the Omnibus Budget Reconciliation Act of 1989, (Fees II Reconsideration), FCC 91-298, released October 10, 1991, at paragraph 48.

Accordingly, your request for a refund is granted. A check for $6,760, payable to Melinda Boucher Read, will be forwarded to you at the earliest practicable time. If you have any questions about this refund, please call Chief, Fee Section, at (202) 632-0241.

Sincerely,

Marilyn J. McDermett

Marilyn J. McDermett
Associate Managing Director
for Operations

FEDERAL COMMUNICATIONS COMMISSION
Washington, D. C. 20554

OCT 22 1991

OFFICE OF
MANAGING DIRECTOR

Peter Gutmann, Esquire
Pepper and Corazzini
200 Montgomery Building
1776 K Street, NW
Washington, D.C. 20006

Dear Mr. Gutmann:

This is in response to your request for a refund of the hearing fee submitted on behalf of White Construction Co., Inc. (White), applicant for a new FM station at Chiefland, Florida.

You state that the Hearing Designation Order in this case (DA 90-1601, released January 17, 1991) established February 6, 1991 as the Notice of Appearance deadline. You further state that White filed its Notice of Appearance and requisite hearing fee on January 28, 1991, and that White subsequently entered into a settlement agreement with the other remaining applicants in this case. This settlement agreement, which, upon approval, will result in a grant of the contested permit to White, was filed by the Notice of Appearance deadline. Also filed by this deadline was a Petition For Leave to Amend and the Amendment to White's application providing supplementary information, as required by paragraphs 4 and 9 of the Hearing Designation Order.

Although the Hearing Designation Order did not specify any issues against White's application, the supplementary information required by paragraphs 4 and 9 meant that the "applicant cannot be granted without resolution of matters specified in the designation order" (see 47 C.F.R. §1.1111(c)(1)), so as to preclude refund of the hearing fee. However, the Commission recently decided that retention of the hearing fee "whenever the sole surviving applicant had to satisfy a directive specified in the designation order is no longer warranted." See Establishment of a Fee Collection Program to Implement the Provisions of the Omnibus Budget Reconciliation Act of 1989, FCC 91-298, released October 10, 1991.

Accordingly, your request for a refund is granted. A check for $6,760, payable to White Construction Co., Inc., will be forwarded to you at the earliest practicable time. If you have any questions about this refund, please call Chief, Fee Section, at (202) 632-0241.

Sincerely,

Marilyn J. McDermett
Associate Managing Director
for Operations

FEDERAL COMMUNICATIONS COMMISSION
Washington, D. C. 20554

OFFICE OF
MANAGING DIRECTOR

OCT 28 1991

Bruce A. Eisen, Esquire
Kaye, Scholer, Fierman, Hays
& Handler
901 Fifteenth Street, N.W.
Suite 1100
Washington, D.C. 20005

Dear Mr. Eisen:

This is in response to your request for a refund of the hearing fee that ET Communications, Inc. (ET) submitted in connection with its application for a new FM station at Opelika, Alabama.

You state that ET entered a settlement agreement with the four competing applicants for the station at Opelika which provided that ET would be the surviving applicant. The settlement agreement was timely filed, and approved by the presiding Administrative Law Judge, but ET's hearing fee was retained because its application was not immediately grantable due to an outstanding directive.

We withheld action in this matter to await the Commission's consideration of whether to permit the refund of a hearing fee in circumstances in which the sole surviving applicant must resolve an outstanding issue or directive. See Establishment of a Fee Collection Program to Implement the Provisions of the Omnibus Budget Act of 1989 (Fees II), 5 FCC Rcd 3558 (1990), reconsidered in part, FCC 91-298, released October 10, 1991. Therein, the Commission concluded that it would not require payment of the hearing fee where the sole surviving applicant was only required to satisfy a directive (as opposed to an issue) specified in the designation order. See Id. at ¶48.

Accordingly, your request is granted. A check, payable in the amount of $6,760.00 and drawn in the name of ET Communications, Inc., will be forwarded to you at the earliest practicable time. If you have any questions concerning this refund, you should contact the Chief, Fee Section at (202) 632-0241.

Sincerely,

Marilyn J. McDermett
Associate Managing Director
for Operations

FEDERAL COMMUNICATIONS COMMISSION
Washington, D. C. 20554

OFFICE OF
MANAGING DIRECTOR

OCT 28 1991

O. L. Bayless
B and H Broadcasting Company
4004 Clay Drive
Jonesboro, Arkansas

Dear Mr Bayless:

This is in response to your request for a refund of the application fee B and H Broadcasting Company (B and H) submitted with its application for a new FM station at Gosnell, Arkansas.

You state that B and H proposed a short-spaced antenna site in its application to serve Gosnell, but the Mass Media Bureau rejected B and H's antenna site proposal because it failed to meet the requirements of section 73.207(a) of the Commission's rules and returned its application. 47 C.F.R. § 73.207(a). As a consequence, you request a refund of the application fee.

After a careful review of this matter, I must conclude that a refund is not warranted. Your application was returned for failure to specify an acceptable antenna location for your proposed station at Gosnell. Once an application has cleared the fee review process, the fee is ordinarily not refunded except in the circumstances enumerated in section 1.1111 of the Commission's rules. See 47 C.F.R. § 1.1111. The dismissal of an application for a substantive deficiency, including failure to specify an acceptable antenna location, does not constitute a permissible exception to the general rule.

Accordingly, your request is denied.

Sincerely,

Marilyn J. McDermett

Marilyn J. McDermett
Associate Managing Director
for Operations

FEDERAL COMMUNICATIONS COMMISSION
Washington, D. C. 20554

OFFICE OF
MANAGING DIRECTOR

OCT 28 1991

Julian P. Freret, Esq.
Booth, Freret & Imlay
1920 N Street, N.W.
Suite 150
Washington, D.C. 20036

Dear Mr. Freret:

This is in response to your request for refund of hearing fee submitted on behalf of Caddo Broadcasting Company (Caddo), the successful applicant for a new FM broadcast station at Hot Springs Village, Arkansas.

You state that while the Hearing Designation Order specified no issues against Caddo's application, paragraphs 2 and 6 required the applicant to submit within 30 days an amendment to its application or the ALJ would specify an appropriate issue against the application (see DA 91-375, released April 12, 1991). You state that Caddo filed the amendment in a timely manner. Caddo also filed a settlement agreement that contemplated universal settlement of the Hot Springs Village proceeding.

The supplementary information required by paragraphs 2 and 6 meant that the "applicant cannot be granted without resolution of matters specified in the designation order" (see 47 C.F.R. §1.1111(c)(1)), so as to preclude refund of the hearing fee. However, the Commission recently decided that retention of the hearing fee "whenever the sole surviving applicant had to satisfy a directive specified in the designation order is no longer warranted." See Establishment of a Fee Collection Program to Implement the Provisions of the Omnibus Budget Reconciliation Act of 1989, (Fees II Reconsideration), FCC 91-298, released October 10, 1991.

Accordingly, your request for a refund is granted. A check for $6,760, payable to Caddo Broadcasting Company, will be forwarded to you at the earliest practicable time. If you have any questions about this refund, please call Chief, Fee Section, at (202) 632-0241.

Sincerely,

Marilyn J. McDermett

Marilyn J. McDermett
Associate Managing Director
for Operations

*U.S. Government Printing Office: 1991 — 312-024/80006